

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA
OFFICE OF THE CLERK

CO2-2527

LORETTA G. WHYTE
CLERK

500 CAMP ST. ROOM C-151
NEW ORLEANS, LA 70130

January 3, 2003

RECEIVED

MAIL

JAN 10 2003

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY
BY

Mr. Bruce Rifkin
Clerk, United States District Court
Western District of Washington
215 United States Courthouse
1010 Fifth Avenue
Seattle, WA 98104-1130

Re Multidistrict Litigation No. 1407
Daphne B. Donnelly, et al
vs
Bayer Corp., et al
Civil Action No. 02-2436 N (1)
Your Case No. C A 02-2527

Dear Mr. Rifkin:

Pursuant to an order of the Multidistrict Litigation Panel to transfer the above-captioned case under Title 28 U.S.C. 1407, to the Western District of Washington, I am forwarding herewith the entire original record together with a copy of the order of transfer and a certified copy of the docket sheet.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

LORETTA G. WHYTE, CLERK

By *Janie Nestosi*
Deputy Clerk

Enclosures



CV 02-2527 - 36

36

TERMED

U.S. District Court
U.S. District Court -- Western Washington (Seattle)

CIVIL DOCKET FOR CASE # 02-CV-2527

| | |
|---|------------------------|
| Donnelly, et al v Bayer Corporation, et al | Filed 01/10/03 |
| Assigned to: Judge Barbara J Rothstein | Jury demand Plaintiff |
| Demand \$0,000 | Nature of Suit 365 |
| Lead Docket 01-MD-1407 | Jurisdiction Diversity |
| Dkt # in East Dist of LA . is 02-2436 N (1) | |

Cause· 28.1332 Diversity-Product Liability

DAPHINE B DONNELLY
plaintiff

Dana Gareth Kirk
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713-651-0050

Clayton Clark
[COR LD NTC]
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713-757-1400

J Robert Davis
[COR LD NTC]
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HOUSTON, TX 77002
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John Chandler Loupe
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CLAITOR & LOUPE
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STE G
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225-767-2222

JEROME DONNELLY, husband
plaintiff

Dana Gareth Kirk
(See above)
[COR LD NTC]

Clayton Clark

Proceedings include all events.
2:02cv2527 Donnelly, et al v. Bayer Corporation, et al

TERMED

(See above)
[COR LD NTC]

J Robert Davis
(See above)
[COR LD NTC]

John Chandler Loupe
(See above)
[COR LD NTC]

v.

BAYER CORPORATION
defendant

John Francis Olinde
504-585-7000
[COR LD NTC]
Charles P Blanchard
FTS FAX
FAX 1-504-585-7075
[COR LD NTC]
Mary L Meyer
504-585-7000
[COR LD NTC]
CHAFFE MCCALL PHILLIPS TOLER &
SARPY
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NOVARTIS PHARMACEUTIS
CORPORATION
defendant

Eric R Nowak
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FAX 1-504-582-1555
[COR LD NTC]
Joy G Braun
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FAX 1-504-582-1555
[COR LD NTC]
Shirin Elisa Harrell
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SESSIONS FISHMAN & NATHAN
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STE 3500
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504-582-1500

NOVARTIS CONSUMER HEALTH INC
defendant

Eric R Nowak
(See above)
[COR LD NTC]
Joy G Braun

Proceedings include all events
2:02cv2527 Donnelly, et al v Bayer Corporation, et al

TERMED

(See above)
[COR LD NTC]
Shirin Elisa Harrell
(See above)
[COR LD NTC]

4LIFE RESEARCH LC, Successor
by merger to Shaperite
defendant

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[COR LD NTC]
J Don Kelly, Jr
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[COR LD NTC]
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504-586-1241

SMOOTHIE KING CO INC
defendant

SMOOTHIE KING SYSTEMS INC
defendant

WALGREEN LOUISIANA CO INC
dba
Walgreens
defendant

Jack Etherton Truitt
[term 03/17/03]
[COR LD NTC]
THE TRUITT LAW FIRM
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T Haller Jackson, III
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Proceedings include all events.

TERMED

2:02cv2527 Donnelly, et al v Bayer Corporation, et al

1/10/03 36 TRANSMITTAL OF DOCUMENTS from the Eastern District of Louisiana per MDL Order CTO (tagalong) effective 12/12/02 re MDL 1407 (PPA) Dist of LA civil case no 02-2436 N (1) (pm) [Entry date 02/20/03] [2 02cv2527]

1/10/03 -- ENT- The Clerk will maintain a master docket and case file under the style PPA cases: orders, pleadings, motions, and other documents will, when filed and docketed in the Master Case File, be deemed filed and docketed in each individual case to the extent possible. (vb) [Entry date 03/21/03] [2.02cv2527]

1/13/03 37 MOTION and MEMORANDUM IN SUPPORT by plaintiff for leave to file amended petition (vb) [Entry date 02/26/03] [2:02cv2527]

1/13/03 -- LODGED ORDER: re motion for leave to file amended petition [37-1] (vb) [Entry date 02/26/03] [2 02cv2527]

1/13/03 -- PROPOSED Amended Petition re motion for leave to file amended petition [37-1] (vb) [Entry date 02/26/03] [2:02cv2527]

2/25/03 38 MOTION by defendant Walgreen Louisiana to substitute attorney T Haller Jackson, III in place of Jack Etherton Truitt (vb) [Entry date 03/04/03] [2 02cv2527]

2/25/03 -- LODGED ORDER: re motion to substitute attorney T Haller Jackson, III in place of Jack Etherton Truitt [38-1] (vb) [Entry date 03/04/03] [2 02cv2527]

3/10/03 39 ORDER by Judge Barbara J. Rothstein GRANTING motion for leave to file amended petition [37-1], [0-0] (cc: counsel, Judge) (vb) [2 02cv2527]

3/10/03 40 AMENDED COMPLAINT by plaintiff in 2:02-cv-02527 (vb) [2 02cv2527]

3/17/03 41 ORDER by Judge Barbara J. Rothstein GRANTING motion to substitute attorney T. Haller Jackson, III in place of Jack Etherton Truitt for Walgreen Louisiana in 2 02-cv-02527 [38-1] (cc: counsel, Judge) (vb) [Entry date 03/18/03] [2 02cv2527]

TERMED MAG-1
TRANSF

U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)

CIVIL DOCKET FOR CASE # 02-CV-2436

Donnelly, et al v Bayer Corporation, et al Filed 08/07/02
Assigned to Judge Kurt D Engelhardt Jury demand Both
Demand \$0,000 Nature of Suit 365
Lead Docket: None Jurisdiction: Diversity
Dkt # in 34th JDC, St Bernard : is 96-487 "C"

Cause: 28 1332 Diversity-Product Liability

DAPHINE B DONNELLY
plaintiff

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JEROME DONNELLY, Husband
plaintiff

Dana G Kirk
(See above)
[COR NTC]

Proceedings include all events.

2 02cv2436 Donnelly, et al v. Bayer Corporation, et al

TERMED MAG-1
TRANSF

Clayton Clark
(See above)
[COR NTC]

J. Chandler Loupe
(See above)
[COR LD NTC]

J. Robert Davis
(See above)
[COR NTC]

v

BAYER CORPORATION, husband
defendant

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(504) 585-7000
[COR]
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CORPORATION
defendant

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Shirin E. Harrell
[COR]
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NOVARTIS CONSUMER HEALTH, INC.
defendant

Joy Goldberg Braun
(See above)
[COR LD NTC]
Eric R. Nowak

Proceedings include all events

2 02cv2436 Donnelly, et al v Bayer Corporation, et al

TERMED MAG-1
TRANSF

(See above)

[COR]

Shirin E. Harrell

(See above)

[COR]

4LIFE RESEARCH LC, Successor
by merger to Shaperite
defendant

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[COR]

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SMOOTHIE KING CO INC
defendant

SMOOTHIE KING SYSTEMS, INC.
defendant

WALGREEN LOUISIANA COMPANY,
INC
dba
Walgreens
defendant

Jack Etherton Truitt

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[COR LD NTC]

The Truitt Law Firm

251 Highway 21

Madisonville, LA 70447

985-792-1062

Proceedings include all events.

2 02cv2436 Donnelly, et al v Bayer Corporation, et al

TERMED MAG-1
TRANSF

| | | |
|---------|----|--|
| 8/7/02 | 1 | Notice of removal by defendant Bayer Corporation, defendant Novartis Phar Corp, defendant Novartis Consumer from 34th Judicial District Court for the Parish of St. Bernard, Case Number. 96-487 "C" . (tbl) [Entry date 08/08/02] |
| 8/7/02 | -- | Payment of filing fee by defendant Bayer Corporation, defendant Novartis Phar Corp, defendant Novartis Consumer in amount of \$ 150.00 (tbl) [Entry date 08/08/02] |
| 8/8/02 | 2 | CERTIFICATE by defendant Bayer Corporation, defendant Novartis Phar Corp, defendant Novartis Consumer of filing of notice of removal (tbl) [Entry date 08/09/02] |
| 8/14/02 | 3 | ANSWER by defendant Novartis Consumer to complaint by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly [1-1], jury demand (tbl) [Entry date 08/15/02] |
| 8/14/02 | 4 | ANSWER by defendant Novartis Phar Corp to complaint by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly [1-1], jury demand (tbl) [Entry date 08/15/02] |
| 8/21/02 | 5 | MOTION by defendant Bayer Corporation for dismissal pursuant to FRCP 12(b)(6) to be heard before Judge Engelhardt at 9:30 9/18/02 (tbl) [Entry date 08/22/02] |
| 8/22/02 | 6 | ANSWER by defendant 4Life Research LC to complaint by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly [1-1] (tbl) [Entry date 08/23/02] |
| 8/30/02 | 7 | MOTION by defendant Walgreen LA Co Inc to dismiss plas' cmp to be heard before Judge Engelhardt at 9:30 9/18/03 (tbl) [Entry date 09/03/02] |
| 9/5/02 | 8 | Cross-Notice of Videotaped Deposition by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly of Bill Carson on 9/26/02 (tbl) [Entry date 09/05/02] |
| 9/5/02 | 9 | Cross-Notice of Videotaped Deposition by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly of Terry Glass on 9/23/02 (tbl) [Entry date 09/05/02] |
| 9/5/02 | 10 | Cross-Notice of Videotaped Deposition by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly of Craig Hammes on 10/7/02 (tbl) [Entry date 09/05/02] |
| 9/5/02 | 11 | Cross-Notice of Videotaped Deposition by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly of Bill VanderHaar on 10/14/02 (tbl) [Entry date 09/05/02] |
| 9/9/02 | 12 | MOTION by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly to remand this matter to the 34th JDC, Parish of St. Bernard to be heard before Judge Engelhardt at 9:30 10/2/02 (tbl) [Entry date 09/09/02] |

Proceedings include all events

2 02cv2436 Donnelly, et al v. Bayer Corporation, et al

TERMED MAG-1
TRANSF

- 9/9/02 13 MOTION by defendant Novartis Phar Corp to dismiss for failure to state a claim upon which relief can be granted to be heard before Judge Engelhardt at 9 30 10/2/02 (tbl) [Entry date 09/09/02]
- 9/9/02 14 MOTION by defendant Novartis Consumer to dismiss for failure to state a claim upon which relief can be granted to be heard before Judge Engelhardt at 9 30 10/2/02 (tbl) [Entry date 09/09/02]
- 9/10/02 15 MINUTE ENTRY (9/9/02) It is ordered that the motions to dismiss filed on behalf of dfts Walgreen LA Co & Bayer Corp presently noticed for hrg on 9/18/02 are cont & renoticed for 9:30 10/2/02. by Judge Kurt D. Engelhardt (tbl) [Entry date 09/10/02]
- 9/10/02 16 Memo in opposition by plaintiff Daphne B Donnelly, plaintiff Jerome Donnelly to motion for dismissal pursuant to FRCP 12(b)(6) [5-1] filed by defendant Bayer Corporation (tbl) [Entry date 09/10/02]
- 9/10/02 17 Memo in opposition by plaintiff Daphne B Donnelly, plaintiff Jerome Donnelly to motion to dismiss plas' cmp [7-1] filed by defendant Walgreen LA Co Inc (tbl) [Entry date 09/10/02]
- 9/11/02 18 Cross-Notice of Deposition by defendant Bayer Corporation of Walter Kernan on 9/18/02 (tbl) [Entry date 09/12/02]
- 9/13/02 19 MOTION by defendant Novartis Consumer for temporary stay to be heard before Judge Engelhardt at 9 30 10/2/02 (tbl) [Entry date 09/13/02]
- 9/23/02 25 Motion by defendant Bayer Corporation for exp hrg on its mtn for temporary stay of proceedings pending a final ruling of the Judicial Panel on Multidistrict Litigation on transfer of this case to MDL-1407 and UNSIGNED ORDER (tbl) [Entry date 09/27/02]
- 9/23/02 26 MOTION by defendant Bayer Corporation for temporary stay of proceedings pending a final ruling of the Judicial Panel on Multidistrict Litigation on transfer of this case to MDL-1407 to be heard before Judge Engelhardt at 9 30 10/16/02 (tbl) [Entry date 09/27/02]
- 9/24/02 20 Memo in opposition by plaintiff Daphne B Donnelly, plaintiff Jerome Donnelly to motion for temporary stay [19-1] filed by defendant Novartis Phar Corp (tbl) [Entry date 09/24/02]
- 9/24/02 21 Memo in opposition by plaintiff Daphne B Donnelly, plaintiff Jerome Donnelly to motion to dismiss for failure to state a claim upon which relief can be granted [14-1] filed by defendant Novartis Consumer (tbl)

Proceedings include all events.

2 02cv2436 Donnelly, et al v Bayer Corporation, et al

TERMED MAG-1
TRANSF

[Entry date 09/24/02]

- 9/24/02 22 Memo in opposition by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly to motion to dismiss for failure to state a claim upon which relief can be granted [13-1] filed by defendant Novartis Phar Corp (tbl) [Entry date 09/24/02]
- 9/24/02 23 Memo in opposition by defendant Bayer Corporation, defendant Novartis Phar Corp, defendant Novartis Consumer to motion to remand this matter to the 34th JDC, Parish of St Bernard [12-1] filed by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly (tbl) [Entry date 09/24/02]
- 9/24/02 24 Memorandum by plaintiff Daphine B Donnelly, plaintiff Jerome Donnelly in opposition to motion for temporary stay filed by defendant Bayer Corporation (tbl) [Entry date 09/24/02]
- 9/24/02 27 Cross-Notice of Videotaped Deposition by defendant Bayer Corporation of Lawrence M Brass on 10/1/02 (tbl) [Entry date 09/27/02]
- 9/27/02 28 MINUTE ENTRY (9/27/02) Bfr the Court are pla's mtn to remand [12], dfts' mtns to dismiss [5, 7, 13, 14], & dft Novartis Consumer's mtn for temporary stay [19], presently noticed for hrg at 9.30 10/2/02, this matter is temporarily stayed pending a final ruling of the Judicial Panel on Multidistrict Litigation on transfer of this case to Multidistrict Litigation MDL 1407, the Court grants the mtn for temporary stay filed on behalf of dft Novartis Consumer Health [19]. by Judge Kurt D Engelhardt (tbl) [Entry date 09/30/02]
- 10/4/02 29 Cross-Notice of Videotaped Deposition by defendant Bayer Corporation of Catherine Viscoli on 10/21/02 (tbl) [Entry date 10/07/02]
- 10/4/02 30 Cross-Notice of Videotaped Deposition by defendant Bayer Corporation of Ralph Horwitz on 10/9/02 (tbl) [Entry date 10/07/02]
- 10/8/02 31 Cross-Notice of Videotaped Deposition by defendant Bayer Corporation of Kerrie Krompf on 10/29/02 (tbl) [Entry date 10/09/02]
- 10/15/02 32 Amended Cross-Notice of Deposition by defendant Bayer Corporation of Connie Kent on 11/12/02 (tbl) [Entry date 10/15/02]
- 10/21/02 33 ORDER from the MDL Panel that the oppositions of plas to transfer this action to the USDC for the Western District of Washington is set for hrg on 11/21/02 w/o oral argument by Clerk, MDL Panel (tbl) [Entry date 10/22/02]

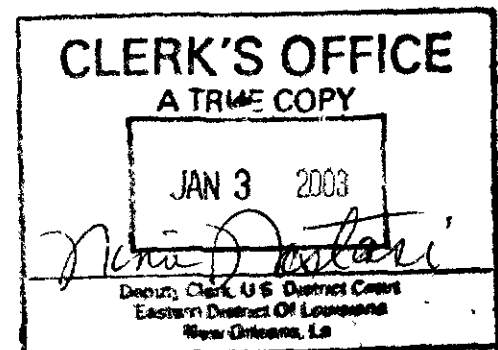
Proceedings include all events.

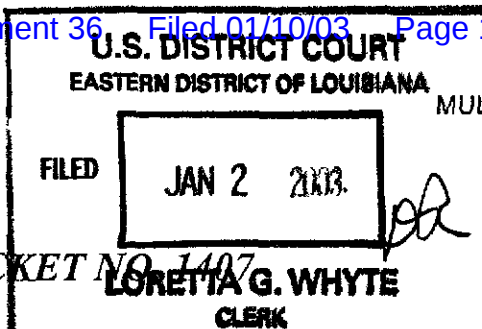
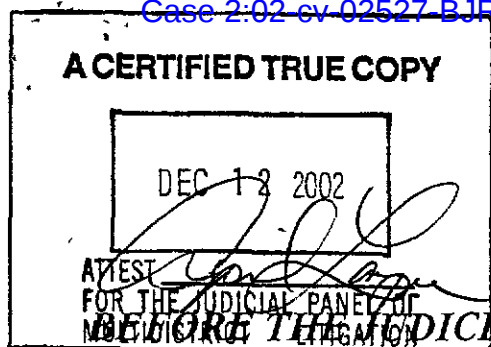
2.02cv2436 Donnelly, et al v. Bayer Corporation, et al

TERMED MAG-1
TRANSF

12/17/02 34 CONDITIONAL ORDER of transfer to the Western District of
Washington, MDL 1407 by Clerk MDL Panel (tbl)
[Entry date 12/18/02]

1/2/03 35 ORDER pursuant to the MDL panel and request to transfer
case to the Western Dist of Washington regarding MDL No
1407 case transferred (CASE CLOSED) (nn)
[Entry date 01/03/03]



JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

DEC 12 2002

FILED
CLERK'S OFFICE

IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION

Billy Ray Crumpton, et al. v. Bayer Corp., et al., N.D. Alabama, C.A. No. 2:02-1469

Karen Lundgren v. Chattem, Inc., et al., N.D. California, C.A. No. 3:02-3715

Daphine B. Donnelly, et al. v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:02-2436 *N*

Gloria Celestine v. Wyeth Co., et al., E.D. Louisiana, C.A. No. 2:02-2468

Patricia Harris, etc. v. Bayer Corp., et al., N.D. Mississippi, C.A. No. 2:02-127

Robert Towner v. American Home Products Corp., et al., N.D. Mississippi, C.A. No. 2:02-132

Eugene Wilson, et al. v. American Home Products Corp., et al., N.D. Mississippi, C.A. No. 2:02-133

Florence Ingram, et al. v. Bayer Corp., et al., N.D. Mississippi, C.A. No. 4:02-39

Dorothy Ann Clay, et al. v. American Home Products Corp., et al., N.D. Mississippi, C.A. No. 4:02-149

Kathleen Burchfield v. American Home Products Corp., et al., N.D. Mississippi, C.A. No. 4:02-151

Dina Smith, etc. v. American Home Products Corp., et al., S.D. Mississippi, C.A. No. 2:02-562

Helen Pipes, etc. v. American Home Products Corp., et al., S.D. Mississippi, C.A. No. 3:02-498

Theresa Brooks, et al. v. American Home Products Corp., et al., S.D. Mississippi, C.A. No. 4:02-273

Ruben Valdez, Jr., et al. v. Wyeth, et al., W.D. Texas, C.A. No. 3:02-310

Antonia Olivas, et al. v. American Home Products Corp., et al., W.D. Texas, C.A. No. 3:02-311

BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN, MOREY L. SEAR,* BRUCE M. SELYA,* JULIA SMITH GIBBONS, D. LOWELL JENSEN AND J. FREDERICK MOTZ,* JUDGES OF THE PANEL

TRANSFER ORDER

Before the Panel are motions brought, pursuant to Rule 74, R P J P M L, 199 F R D 425, 435-36 (2001), by plaintiffs in fifteen actions seeking to vacate Panel orders conditionally transferring their respective actions pending in the Northern District of Alabama, the Northern District of California, the Eastern District of Louisiana, the Northern District of Mississippi, the Southern District of Mississippi, and the Western District of Texas. Plaintiffs object to transfer of their actions to the Western District of Washington for inclusion in the centralized pretrial

*Judges Sear and Selya took no part in the decision of this matter. Additionally, Judge Motz took no part in the disposition of this matter with respect to one of the Western District of Texas actions.

X / Dkt
CtRmDep
Doc.No. 36

- 2 -

proceedings occurring there in this docket before Judge Barbara Jacobs Rothstein Various defendants in the actions have responded in support of transfer

On the basis of the papers filed and hearing session held, the Panel finds that these actions involve common questions of fact with actions in this litigation previously transferred to the Western District of Washington, and that transfer of the actions to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring there will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The Panel is persuaded that transfer of the actions is appropriate for reasons expressed by the Panel in its original order directing centralization in this docket. The Panel held that the Western District of Washington was a proper Section 1407 forum for actions brought by persons allegedly injured by products containing Phenylpropanolamine (PPA) – a substance which, until it recently became the subject of a public health advisory issued by the Food and Drug Administration, was used as an ingredient in many nasal decongestants and weight control products. *See In re Phenylpropanolamine (PPA) Products Liability Litigation*, 173 F Supp 2d 1377 (J P M L 2001)

The plaintiffs opposing transfer of their actions premise much of their opposition to transfer on their argument that federal jurisdiction is lacking in their actions. These parties urge the Panel not to order transfer before remand motions are resolved by the appropriate transferor court. We note that remand and other motions, if not resolved in transferor courts by the time of Section 1407 transfer, can be presented to and decided by the transferee judge. *See, e g, In re Ivy*, 901 F 2d 7 (2nd Cir 1990), *In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F Supp 2d 1346, 1347-48 (J P M L 2001)

IT IS THEREFORE ORDERED that, pursuant to 28 U S C § 1407, these fifteen actions are transferred to the Western District of Washington and, with the consent of that court, assigned to the Honorable Barbara Jacobs Rothstein for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket

I hereby certify that the
annexed instrument is a true
and correct copy of the original
on file in my office

ATTEST. BRUCE RIFKIN

Clerk, U.S. District Court
Western District of Washington

By Valerie Barber
Deputy Clerk

FOR THE PANEL.

Wm Terrell Hodges

Wm Terrell Hodges
Chairman

INVOLVED COUNSEL LIST
DOCKET NO. 1407
IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION

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DOCKET NO. 1407
IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION

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DOCKET NO. 1407
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United States District Court
Middle District of Florida

MEMBERS
Judge John F. Keenan
United States District Court
Southern District of New York

Judge Morey L. Sear
United States District Court
Eastern District of Louisiana

Judge Bruce M. Selya
United States Court of Appeals
First Circuit

Judge Julia Smith Gibbons
United States Court of Appeals
Sixth Circuit

Judge D. Lowell Jensen
United States District Court
Northern District of California

Judge J. Frederick Motz
United States District Court
District of Maryland

DIRECT REPLY TO

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Clerk of the Panel
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Telephone [202] 502-2800
Fax [202] 502-2888

<http://www.jpml.uscourts.gov>

December 12, 2002

FILED
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MAIL

DEC 17 2002

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY *[Signature]* DEPUTY

Bruce Rifkin, Clerk
215 William Kenzo Nakamura
U. S. Courthouse
1010 Fifth Avenue
Seattle, WA 98104-1130

Re. MDL-1407 -- In re Phenylpropanolamine (PPA) Products Liability Litigation

Billy Ray Crumpton, et al. v. Bayer Corp., et al., N D Alabama, C A. No. 2:02-1469
Karen Lundgren v. Chattem, Inc., et al., N D California, C.A. No. 3:02-3715
Daphne B. Donnelly, et al. v. Bayer Corp., et al., E D Louisiana, C.A. No. 2:02-2436 *N*
Gloria Celestine v. Wyeth Co., et al., E D Louisiana, C A. No. 2:02-2468
Patricia Harris, etc. v. Bayer Corp., et al., N.D. Mississippi, C A. No. 2:02-127
Robert Towner v. American Home Products Corp., et al., N D Mississippi, C A. No. 2:02-132
Eugene Wilson, et al. v. American Home Products Corp., et al., N D Mississippi, C.A. No. 2:02-133
Florence Ingram, et al. v. Bayer Corp., et al., N D Mississippi, C A. No. 4:02-39
Dorothy Ann Clay, et al. v. American Home Products Corp., et al., N D Mississippi, C.A. No. 4:02-14
Kathleen Burchfield v. American Home Products Corp., et al., N D Mississippi, C A. No. 4:02-151
Dina Smith, etc. v. American Home Products Corp., et al., S.D. Mississippi, C A. No. 2:02-562
Helen Pipes, etc. v. American Home Products Corp., et al., S D. Mississippi, C A. No. 3:02-498
Theresa Brooks, et al. v. American Home Products Corp., et al., S D Mississippi, C A. No. 4:02-273
Ruben Valdez, Jr., et al. v. Wyeth, et al., W.D. Texas, C A. No. 3:02-310
Antonia Olivas, et al. v. American Home Products Corp., et al., W D. Texas, C.A. No. 3:02-311

Dear Mr. Rifkin

I am enclosing a certified copy and additional copies of an order filed by the Judicial Panel on Multidistrict Litigation in the above-captioned matter. The act creating the Panel provides that:

Orders of transfer shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. 28 U.S.C. § 1407(c)



MD 01-01407 #00001294

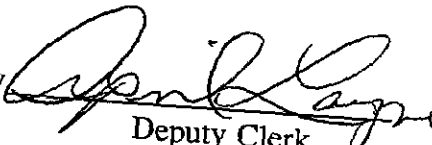
1294

As is also required by the statute, a copy of the order is being sent to the clerk for the Southern District of Georgia, the district in which the hearing on this matter was held on November 21, 2002.

A list of involved counsel is attached.

Very truly,

Michael J. Beck
Clerk of the Panel

By 
Deputy Clerk

Enclosures/Attachment

cc: Transferee Judge Judge Barbara Jacobs Rothstein
Transferor Judges: (See Attached List of Judges)
Transferor Clerks (See Attached List of Clerks)
Hearing District Clerk Scott Poff

I hereby certify that the
annexed instrument is a true
and correct copy of the original
on file in my office.

ATTEST BRUCE RIFKIN
Clerk, U.S. District Court
Western District of Washington

By 
Deputy Clerk

JPML Form 2

RECEIVED UNITED STATES DISTRICT COURT
U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON
EAST DISTRICT OF LA OFFICE OF THE CLERK

BRUCE RIFKIN
CLERK

2003 JAN -2 PM 3:07

LORETTA G. WHYTE
CLERK

WILLIAM KENZO NAKAMURA
U S COURTHOUSE, SUITE 215
SEATTLE, WASHINGTON 98104

December 18, 2002

Mr Warren A Cuntz, Jr

United States District Court
C-367 United States Courthouse
500 Camp Street
New Orleans, LA 70130

IN RE MDL 1407 (PPA) PHENYLPROPANOLAMINE PRODUCTS LIABILITY LITIGATION

Dear Clerk

Enclosed is certified copy of the Transfer Order entered by the Judicial Panel on Multidistrict Litigation. The Order became effective December 12, 2002 We have assigned an individual Western District of Washington (WAW) case number to your case to be transferred to us as listed below

Please send us your file along with a certified copy of your docket entries When you send your file, please refer to our civil action number

Title of Case
Donnelly v Bayer Corp
Celestine v Wyeth Co

Your Number
2.02-2436 ✓
2 02-2468

WAW Number

CV02-2527
CV02-2528

Sincerely,

BRUCE RIFKIN, CLERK

BY

Valerie Barber
Valerie Barber, Deputy Clerk
206-553-4170 ext 4

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANAJUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

FILED

DEC 17 2002

DEC 12 2002

FILED
CLERK'S OFFICE

LORETTA G. WHYTE

DOCKET NO. 1407

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION***Billy Ray Crumpton, et al. v. Bayer Corp., et al.*, N.D. Alabama, C.A. No. 2:02-1469*Karen Lundgren v. Chattem, Inc., et al.*, N.D. California, C.A. No. 3:02-3715*Daphine B. Donnelly, et al. v. Bayer Corp., et al.*, E.D. Louisiana, C.A. No. 2:02-2436 *N**Gloria Celestine v. Wyeth Co., et al.*, E.D. Louisiana, C.A. No. 2:02-2468 *F**Patricia Harris, etc. v. Bayer Corp., et al.*, N.D. Mississippi, C.A. No. 2:02-127*Robert Towner v. American Home Products Corp., et al.*, N.D. Mississippi, C.A. No. 2:02-132*Eugene Wilson, et al. v. American Home Products Corp., et al.*, N.D. Mississippi, C.A. No. 2:02-133*Florence Ingram, et al. v. Bayer Corp., et al.*, N.D. Mississippi, C.A. No. 4:02-39*Dorothy Ann Clay, et al. v. American Home Products Corp., et al.*, N.D. Mississippi, C.A. No. 4:02-149*Kathleen Burchfield v. American Home Products Corp., et al.*, N.D. Mississippi, C.A. No. 4:02-151*Dina Smith, etc. v. American Home Products Corp., et al.*, S.D. Mississippi, C.A. No. 2:02-562*Helen Pipes, etc. v. American Home Products Corp., et al.*, S.D. Mississippi, C.A. No. 3:02-498*Theresa Brooks, et al. v. American Home Products Corp., et al.*, S.D. Mississippi, C.A. No. 4:02-273*Ruben Valdez, Jr., et al. v. Wyeth, et al.*, W.D. Texas, C.A. No. 3:02-310*Antonia Olivas, et al. v. American Home Products Corp., et al.*, W.D. Texas, C.A. No. 3:02-311**BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN, MOREY L. SEAR,* BRUCE M. SELYA,* JULIA SMITH GIBBONS, D. LOWELL JENSEN AND J. FREDERICK MOTZ,* JUDGES OF THE PANEL****TRANSFER ORDER**

Before the Panel are motions brought, pursuant to Rule 74, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), by plaintiffs in fifteen actions seeking to vacate Panel orders conditionally transferring their respective actions pending in the Northern District of Alabama, the Northern District of California, the Eastern District of Louisiana, the Northern District of Mississippi, the Southern District of Mississippi, and the Western District of Texas. Plaintiffs object to transfer of their actions to the Western District of Washington for inclusion in the centralized pretrial

*Judges Sear and Selya took no part in the decision of this matter. Additionally, Judge Motz took no part in the disposition of this matter with respect to one of the Western District of Texas actions (*Valdez*).

Process
X Dkt'd *TRC*
Clerk in Dep. *GA*
Doc. No. *51*

- 2 -

proceedings occurring there in this docket before Judge Barbara Jacobs Rothstein. Various defendants in the actions have responded in support of transfer.

On the basis of the papers filed and hearing session held, the Panel finds that these actions involve common questions of fact with actions in this litigation previously transferred to the Western District of Washington, and that transfer of the actions to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring there will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The Panel is persuaded that transfer of the actions is appropriate for reasons expressed by the Panel in its original order directing centralization in this docket. The Panel held that the Western District of Washington was a proper Section 1407 forum for actions brought by persons allegedly injured by products containing Phenylpropanolamine (PPA) – a substance which, until it recently became the subject of a public health advisory issued by the Food and Drug Administration, was used as an ingredient in many nasal decongestants and weight control products. *See In re Phenylpropanolamine (PPA) Products Liability Litigation*, 173 F Supp 2d 1377 (J P M L 2001)

The plaintiffs opposing transfer of their actions premise much of their opposition to transfer on their argument that federal jurisdiction is lacking in their actions. These parties urge the Panel not to order transfer before remand motions are resolved by the appropriate transferor court. We note that remand and other motions, if not resolved in transferor courts by the time of Section 1407 transfer, can be presented to and decided by the transferee judge. *See, e g , In re Ivy*, 901 F 2d 7 (2nd Cir 1990), *In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F Supp 2d 1346, 1347-48 (J P M L 2001)

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, these fifteen actions are transferred to the Western District of Washington and, with the consent of that court, assigned to the Honorable Barbara Jacobs Rothstein for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket

FOR THE PANEL



Wm Terrell Hodges
Chairman

INVOLVED COUNSEL LIST**DOCKET NO. 1407****IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION**

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245 East Capital Street
Jackson, MS 39201

Hon Philip R Martinez
U S District Judge
U S Courthouse
511 East San Antonio Avenue
El Paso, TX 79901

Hon Michael P Mills
U S District Judge
355 Federal Bldg & U S Courthouse
911 Jackson Avenue, West
Oxford, MS 38653

Hon Edwin L Nelson
U S District Judge
786 Hugo L Black U S Courthouse
1729 5th Avenue North
Birmingham, AL 35203

Hon W Allen Pepper, Jr
U S District Judge
United States District Court
Post Office Box 370
Greenville, MS 38702-0370

Hon Charles W Pickering, Sr
U S District Judge
228 U S Courthouse & Federal Bldg
701 North Main Street
Hattiesburg, MS 39401

Hon Henry T Wingate
U S District Judge
109 James O Eastland U S Courthouse
245 East Capitol Street
Jackson, MS 39201

INVOLVED CLERKS LIST
DOCKET NO. 1407
IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION

Arlen B Coyle, Clerk
U S District Court
P O Box 190
Greenville, MS 38702-0190

Arlen B Coyle, Clerk
369 Federal Building & U S Courthouse
911 Jackson Avenue East
Oxford, MS 38655-3622

J T Noblin, Clerk
200 U S Courthouse & Federal Building
701 North Main Street
Hattiesburg, MS 39401

J T Noblin, Clerk
316 James O Eastland U S Courthouse
245 East Capitol Street
Jackson, MS 39201

Loretta G Whyte, Clerk
C-151 U S Courthouse
500 Camp Street
New Orleans, LA 70130-3367

Perry D Mathis, Clerk
140 Hugo L Black U S Courthouse
1729 5th Avenue North
Birmingham, AL 35203

Richard W Wieking, Clerk
Phillip Burton U S Courthouse
Box 36060
450 Golden Gate Avenue
San Francisco, CA 94102-3489

William G Putnicki, Clerk
350 U S Courthouse
511 East San Antonio Street
El Paso, TX 79901-2401

UNITED STATES OF AMERICA

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

CHAIRMAN

Judge Wm Terrell Hodges
United States District Court
Middle District of Florida

MEMBERS

Judge John F. Keenan
United States District Court
Southern District of New York

Judge Morey L. Sear
United States District Court
Eastern District of Louisiana

Judge Bruce M. Selya
United States Court of Appeals
First Circuit

Judge Julia Smith Gibbons
United States Court of Appeals
Sixth Circuit

Judge D. Lowell Jensen
United States District Court
Northern District of California

Judge J. Frederick Motz
United States District Court
District of Maryland

DIRECT REPLY TO

Michael J. Beck
Clerk of the Panel
One Columbus Circle, NE
Thurgood Marshall Federal
Judiciary Building
Room G-255, North Lobby
Washington, D.C. 20002

Telephone [202] 502-2800
Fax [202] 502-2888

<http://www.jpml.uscourts.gov>

December 12, 2002

Bruce Rifkin, Clerk
215 William Kenzo Nakamura
U.S. Courthouse
1010 Fifth Avenue
Seattle, WA 98104-1130

Re MDL-1407 -- In re Phenylpropanolamine (PPA) Products Liability Litigation

Billy Ray Crumpton, et al v Bayer Corp, et al, N D Alabama, C A No 2 02-1469
Karen Lundgren v Chattem, Inc, et al, N D California, C A No 3 02-3715
Daphne B. Donnelly, et al v Bayer Corp, et al, E D Louisiana, C A No 2 02-2436
Gloria Celestine v Wyeth Co, et al, E D Louisiana, C A No 2 02-2468
Patricia Harris, etc v Bayer Corp, et al, N D Mississippi, C A No 2 02-127
Robert Towner v American Home Products Corp, et al, N D Mississippi, C A No 2 02-132
Eugene Wilson, et al v American Home Products Corp, et al, N D Mississippi, C A No 2 02-133
Florence Ingram, et al v Bayer Corp, et al, N D Mississippi, C A No 4 02-39
Dorothy Ann Clay, et al v American Home Products Corp, et al, N D Mississippi, C A No 4:02-149
Kathleen Burchfield v American Home Products Corp, et al, N D Mississippi, C A No 4 02-151
Dina Smuth, etc v American Home Products Corp, et al, S D Mississippi, C A No 2 02-562
Helen Pipes, etc v American Home Products Corp, et al, S D Mississippi, C A No 3 02-498
Theresa Brooks, et al v American Home Products Corp, et al, S D Mississippi, C A No 4 02-273
Ruben Valdez, Jr, et al v Wyeth, et al, W D Texas, C A No 3 02-310
Antonia Olivas, et al v American Home Products Corp, et al, W D Texas, C A No 3 02-311

Dear Mr. Rifkin:

I am enclosing a certified copy and additional copies of an order filed by the Judicial Panel on Multidistrict Litigation in the above-captioned matter. The act creating the Panel provides that

Orders of transfer shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. 28 U.S.C. § 1407(c)

As is also required by the statute, a copy of the order is being sent to the clerk for the Southern District of Georgia, the district in which the hearing on this matter was held on November 21, 2002

A list of involved counsel is attached

Very truly,

Michael J Beck
Clerk of the Panel

By 
Deputy Clerk

Enclosures/Attachment

cc Transferee Judge Judge Barbara Jacobs Rothstein
Transferor Judges (See Attached List of Judges)
Transferor Clerks (See Attached List of Clerks)
Hearing District Clerk Scott Poff

JPML Form 29



CASE: 2:02-cv-02436
DOCUMENT: 34
DATE 12/18/02
CLERK. tbl

Notices sent to:

J. Loupe by fax to 225-767-9003
Dana Kirk by mail.
Clayton Clark by mail.
J. Davis by mail.
Mary Meyer by fax to 504-544-6077
Joy Braun by fax to 504-582-1555
C Bradley Jr. by fax to 504-584-9142
Jack Truitt by fax to 985-792-1065

Document scanned by: _____

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, positioned over the signature line.

UNITED STATES OF AMERICA

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

CHAIRMAN
Judge Wm. Terrell Hodges
United States District Court
Middle District of Florida

MEMBERS
Judge John F. Keenan
United States District Court
Southern District of New York

Judge Morey L. Sear
United States District Court
Eastern District of Louisiana

Judge Bruce M. Selya
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First Circuit

Judge Julia Smith Gibbons
United States Court of Appeals
Sixth Circuit

Judge D. Lowell Jensen
United States District Court
Northern District of California

Judge J. Frederick Motz
United States District Court
District of Maryland

DIRECT REPLY TO

Michael J. Beck
Clerk of the Panel
One Columbus Circle, NE
Thurgood Marshall Federal
Judiciary Building
Room G-255, North Lobby
Washington, D.C. 20002

Telephone [202] 502-2800
Fax [202] 502-2888

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

October 16, 2002

NOTICE OF HEARING SESSION

FILED

OCT 21 2002

LORETTA G. WHYTE
CLERK

Dear Counsel

Pursuant to the order of the Judicial Panel on Multidistrict Litigation filed today, you are hereby notified that a hearing session has been scheduled to consider various matters pursuant to 28 U.S.C. § 1407

DATE OF HEARING SESSION November 21, 2002

LOCATION OF HEARING SESSION: Old Federal Building
Third Floor Courtroom
125 Bull Street
Savannah, GA 31401

CA 02-2436 ✓

TIME OF HEARING SESSION: In those matters designated for oral argument, counsel presenting oral argument must be present at **8:30 a.m.** in order for the Panel to allocate the amount of time for oral argument. Oral argument will commence at **9:30 a.m.**

Please direct your attention to the enclosed Hearing Session Order and Schedule of Matters for Hearing Session for a listing of the matters scheduled for consideration at this hearing session

- Section A of this Schedule lists the matters designated for oral argument.
- Section B of this Schedule lists the matters that the Panel has determined to consider **without oral argument**, pursuant to Rule 16 l(c), R.P.J.P.M.L., 199 F.R.D. 425, 439 (2001)

For those matters listed on Section A of the Schedule, the enclosed blue "Notice of Presentation or Waiver of Oral Argument" must be returned to this office no later than **November 4, 2002**. Note the procedures governing Panel oral argument which are outlined on the enclosed "Procedures for Oral Argument before the Judicial Panel on Multidistrict Litigation." These procedures are strictly adhered to and your cooperation is appreciated

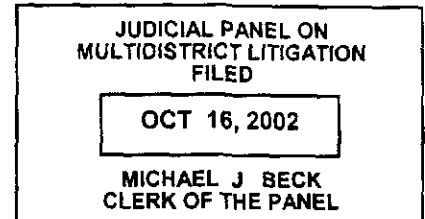
Very truly,

Michael J. Beck

Michael J. Beck
Clerk of the Panel

| | |
|---------|---------|
| Fed | Process |
| X Dktd | MOL |
| CtRmDep | GJ |
| Doc.No. | GJ |

c: Clerk, U.S. District Court for the Southern District of Georgia



BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

***WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN, MOREY L. SEAR,
BRUCE M. SELYA, JULIA SMITH GIBBONS, D. LOWELL JENSEN AND J.
FREDERICK MOTZ, JUDGES OF THE PANEL***

HEARING SESSION ORDER

IT IS ORDERED that on November 21, 2002, a hearing session will be held in Savannah, Georgia, to consider the matters on the attached Schedule under 28 U S C § 1407

IT IS FURTHER ORDERED that at said hearing session the Panel may, on its own initiative, consider transfer of any or all of the actions in those matters to any district or districts.

IT IS FURTHER ORDERED that at said hearing session the matters listed on Section A of the attached Schedule shall be designated for oral argument.

IT IS FURTHER ORDERED that at said hearing session the matters listed on Section B of the attached Schedule shall be considered without oral argument, pursuant to Rule 16 1(c), R.P J P M L , 199 F R D 425, 439 (2001) The Panel reserves the prerogative, on any basis including submissions of parties pursuant to Panel Rule 16 1(b), to issue a subsequent notice designating any of those matters for oral argument.

IT IS FURTHER ORDERED that the Clerk of the Judicial Panel on Multidistrict Litigation shall direct notice of this hearing session to counsel for all parties involved in the matters on the attached Schedule

FOR THE PANEL.



Wm. Terrell Hodges
Chairman

Schedule of Matters for Hearing Session, Section B
Savannah, Georgia

p 15

MDL-1373 (Continued)

Opposition of defendant Bridgestone/Firestone North American Tire, LLC, to remand of the following action to the United States District Court for the Central District of California

Southern District of Indiana

Jerry Boone, et al v Ford Motor Co , et al , C A No 1.00-5069 (C D California, C A. No 2 00-10818)

MDL-1401 -- In re Sulzer Orthopedics Inc Hip Prosthesis and Knee Prosthesis Products Liability Litigation

Opposition of plaintiff Hill Physicians Medical Group, Inc , to transfer of the following action to the United States District Court for the Northern District of Ohio.

Northern District of California

Hill Physicians Medical Group, Inc v Sulzer Orthopedics, Inc., et al , C A. No. 3 02-3257

MDL-1407 -- In re Phenylpropanolamine (PPA) Products Liability Litigation

Oppositions of plaintiffs to transfer of their respective following actions to the United States District Court for the Western District of Washington

Northern District of Alabama

Billy Ray Crumpton, et al v Bayer Corp , et al , C A No 2-02-1469

Northern District of California

Karen Lundgren v Chattem, Inc , et al , C A No 3 02-3715

Schedule of Matters for Hearing Session, Section B
Savannah, Georgia

p 16

MDL-1407 (Continued)

Eastern District of Louisiana

John C Delahoussye v Bayer Corp , et al., C A No. 2.02-1742 *A*
Mike Byrd, et al v Bayer Corp , et al , C A No. 2:02-1750 *L*
Daphine B Donnelly, et al v Bayer Corp , et al , C.A. No. 2.02-2436 *N*
Gloria Celestine v Wyeth Co , et al , C A No 2 02-2468 *F*
Ann Knapper v Wyeth Co , et al , C A. No. 2:02-2485 *B*

Middle District of Louisiana

Rayfield Malveaux, Jr , et al. v Bayer Corp , et al., C.A No 3.02-555

Western District of Louisiana

Margie A Pier, et al v Bayer Corp , et al , C A No. 1 02-1196
Gracie Patterson, et al v Bayer Corp , et al , C.A No 3 02-1194
Barbara Adams, et al. v Bayer Corp , et al , C A. No. 5.02-1195
Peggy Stroud, et al v Bayer Corp , et al , C.A. No. 6.02-1190

Northern District of Mississippi

Patricia Harris, etc v Bayer Corp , et al , C A. No. 2:02-127
Robert Towner v American Home Products Corp , et al., C.A. No 2 02-132
Eugene Wilson, et al. v American Home Products Corp , et al , C A. No. 2:02-133
Florence Ingram, et al v Bayer Corp., et al , C.A. No. 4 02-39
Dorothy Ann Clay, et al. v American Home Products Corp , et al , C.A. No 4 02-149
Kathleen Burchfield v American Home Products Corp , et al., C.A No 4 02-151

Southern District of Mississippi

Dina Smith, etc. v American Home Products Corp , et al , C A. No 2.02-562
Helen Pipes, etc v American Home Products Corp , et al , C.A. No. 3:02-498
Theresa Brooks, et al v American Home Products Corp , et al , C.A. No 4 02-273

Western District of Texas

Ruben Valdez, Jr , et al v Wyeth, et al., C A. No 3 02-310
Antonia Olivas, et al v American Home Products Corp , et al., C.A. No 3 02-311

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 OCT 15 PM 12:19
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION;
NOVARTIS CONSUMER HEALTH, INC.,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE; SMOOTHIE KING
CO., INC., SMOOTHIE KING SYSTEMS,
INC., and WALGREEN LOUISIANA CO.,
INC. (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
*
*
*
*

**AMENDED CROSS-NOTICE OF
VIDEOTAPED DEPOSITION OF CONNIE KENT**

PLEASE TAKE NOTICE that in connection with *In re Phenylpropanolamine (PPA) Products Liability Litigation*, United States District Court, Western District of Washington, MDL Docket No 1407, plaintiffs will take the deposition upon oral examination of CONNIE KENT, now or formerly an employee of Bayer Corporation, on November 12, 2002 at the Holiday Inn Harbor Side Hotel Meeting Room, 33 Tamiami Trail, Punta Gorda,

FILED
Proc. 7/10/02
X Dkt. 7/10/02
Ct. Rm. Dep.
Doc. No. 32

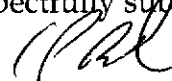
FL 33950 (1-877-639-9339, <http://www.holidayinnharborside.com>), beginning at 9.00 A.M. and continuing until completed.

The deposition will be conducted pursuant to the provisions of Case Management Order No. 1,¹ will be stenographically recorded by the court reporting firm of Tate & Tate, 180 Tuckerton Road, Suite 5, Medford, NJ 08055 and will be videotaped by Inwood Multi-Media Products, Ltd, 327 West Fayette Street, Suite 222, Syracuse, NY 13202. The examination will also be videotaped by Veritext, 25B Vreeland Road, Florham Park, NJ 07932, which will have a video camera trained on the questioner during the examination. Tim O'Brien and David Jim Green will represent plaintiffs.

You are at liberty to appear and examine the witness.

DATED this 14th day of October, 2002

Respectfully submitted,



Mary L. Meyer, Esq. (19966)
John F. Olinde (1515)
Charles P. Blanchard (18798)
**CHAFFE, MCCALL, PHILLIPS,
TOLER & SARP, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

¹ A copy of the Case Management Order No. 1 was attached to other Cross-Notices of Depositions filed in this case.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 14th day of October, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid.



TM
FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 OCT -8 PM 3:41
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
*
*
*
*

**CROSS-NOTICE OF VIDEOTAPED
DEPOSITION OF KERRIE KROMPF**

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure, Rule 26,
et seq , and in connection with *In Re Phenylpropanolamine (PPA) Products Liability Litigation*,
United States District Court, Western District of Washington, MDL Docket No 1407,
defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") and other
manufacturer defendants will take the deposition of Kerrie Krompf at the Wyndham Hotel,
125 10th Street, Atlanta, Georgia (Telephone No 404/873-4800), commencing at 9 00 a m

Fee _____
Process _____
Dtd TXBL
CtRmDep _____
Doc No 31

a m on October 29, 2002 and continuing on October 30, 2002 (at 9 00 a m), or such other places, times and dates to which the parties and the witnesses may agree A copy of the Notice of Deposition of Kerrie Krompf is attached hereto as Exhibit A

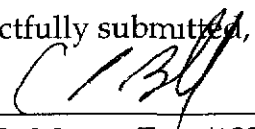
PLEASE TAKE FURTHER NOTICE that the witness has been directed to produce for inspection, copying and use at the deposition the documents and things described in the attachment to Exhibit A

This deposition will be recorded by videotape as well as by stenographic means by the court reporting firm of Tate & Tate, Inc , 180 Tuckerton Road, Suite 5, The Lexington Building, Medford, NJ 08055

You are invited to attend and cross-examine the witness

DATED this 8th day of October, 2002

Respectfully submitted,



Mary L Meyer, Esq (19966)
John F Olinde (1515)
Charles P Blanchard (18798)
**CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of October, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid



HON BARBARA JACOBS ROTHSTEIN, U S D J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE PHENYLPROPANOLAMINE (PPA))
PRODUCT LIABILITY LITIGATION)

**SUPPLEMENTAL NOTICE OF
DEPOSITION OF
KERRIE KROMPF**

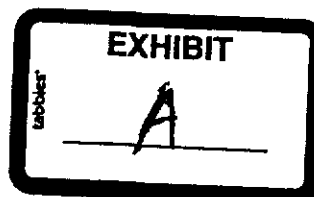
-----)
This document relates to all actions)

-----)
and to the State Court actions to which this)
notice applies)

Case No MDL-1407

Pursuant to Federal Rules of Civil Procedure, Rules 26 et seq, and this Court's Order filed August 19, 2002, and in supplementation of their notice of deposition of June 10, 2002, defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") and other manufacturer defendants will take the deposition of Kerrie Krompf at The Wyndam Hotel, 125 10th Street, Atlanta, Georgia 30309 (Tel No 404 873-4800) commencing at 9 00 a m on October 29, 2002, and continuing on October 30, 2002 (at 9 00 a m), or such other places, times and dates to which the parties and the witness may agree

Please take further notice that the witness has been directed to produce for inspection, copying, and use at the deposition the documents and things described in the attached Exhibit A



Please take further notice that the above deposition will be recorded by videotape as well as by stenographic means, by the firm Tate & Tate, Inc., 180 Tuckerton Road, Suite 5, The Lexington Building Medford, New Jersey 08055

Dated October 2, 2002
Buffalo, New York

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER LLP

By 

Tamar P Halpern, Esq

Thomas S Wiswall, Esq

3400 HSBC Center

Buffalo, New York 14203-2887

Telephone No (716) 847-8400

DRINKER BIDDLE & REATH LLP

Michael J Stortz, Esq

Charles F Preuss, Esq

225 Bush Street

15th Floor

San Francisco, California 94104

Telephone No (415) 397-1730

Attorneys for Defendant

SmithKline Beecham Corporation d/b/a GlaxoSmithKline

FO Plaintiffs' Lead Counsel
 Plaintiffs' Liaison Counsel
 Defendants' Liaison Counsel
 Defendants' Lead Counsel
 Sarah K. Biran, Esq
 Counsel in State court actions

EXHIBIT "A"

As used herein, the term "document" or "documents" shall mean and include any written, printed, drawn, recorded, transcribed, filed or graphic matter, however produced, reproduced, or stored on computer or otherwise electronically stored, and any originals, copies, drafts, revisions, or amendments thereof. "Document" or "Documents" shall include, by way of example and without limitation, letters, memoranda, notes, e-mails, test data, charts, x-rays, reports, medical records, records of payment, diagrams, manuals, test procedures, sketches, graphs, prints, secretarial notes, work pads, diaries, films, tapes, videotapes, photographs, computer disks, computer printouts, computer memory banks, books, publications, literature, announcements, or other writings or tangible objects. Further, "document" or "documents" requested herein extend to and include any and all such materials within the possession, custody, or control of you and your agents, attorneys, or representatives, regardless of where located. For any document withheld from production, and any document redacted in any manner, please identify the document withheld or redacted by date, author, type of document, subject matter, recipient, and any grounds for withholding or redaction of the document. You are to produce the materials in your possession, custody, or control listed below.

1. All documents related to the initiation of the Yale Hemorrhagic Stroke Project (hereinafter "HSP").
2. All documents related to the organizational structure of persons involved in the HSP.
3. All documents relating to the study personnel's experience and credentials (including but not limited to the curriculum vitae of each professional who participated in the study).
4. All medical literature and case reports that were considered, reviewed, relied upon, and/or utilized in any manner by you or by any investigator or other personnel involved in the HSP from the inception of the HSP until its publication in the New England Journal of Medicine.
5. All documents related to the Protocol for the HSP including, but not limited to:
 - a) all documents related to the creation or development of the Protocol,
 - b) all documents related to the estimation of the sample size, including MRI market research data,
 - c) all documents related to or containing communications with anyone regarding the Protocol,
 - d) all documents related to comments, revisions, or modifications to the Protocol, and

- e) all drafts of the protocol
- 6 All documents related to obtaining Institutional Review Board Approval of the HSP
 - 7 All documents related to the conduct of the HSP including, but not limited to
 - a) all documents regarding or concerning the network of participating hospitals;
 - b) all documents regarding the recruitment of investigators, hospitals, and all persons involved in any way in the HSP,
 - c) all procedure manuals and all investigator's brochures; and
 - d) all documents regarding the training of any and all persons involved in the HSP, including but not limited to training manuals, training videotapes, training attendance, identity of trainers, and confirmation of training
 - 8 All documents related to the ascertainment of cases in the HSP including, but not limited to, all documents regarding
 - a) the active surveillance program,
 - b) the surveillance team;
 - c) the case definition;
 - d) methods of case ascertainment; and
 - e) exclusion criteria
 9. All documents related to the selection of controls in the HSP including, but not limited to, all documents regarding the use of random digit dialing and all documents concerning telephone numbers that did not result in an eligible person or control.
 - 10 All documents related to data collection and processing in the HSP including, but not limited to
 - a) all data collection forms,
 - b) all interview data forms,

- c) training manuals for interviewers,
- d) data logs regarding cases and controls,
- e) all case identification forms,
- f) all potential control forms,
- g) all log-in records;
- h) all data editing, coding and validation manuals,
- i) all screening questionnaires;
- j) all documents and records reviewed by a panel of stroke neurologists involved in the determination of whether eligibility criteria were met;
- k) all documents and records reviewed or generated by study physicians,
- l) all documents and records, including logs, regarding stroke patients rejected as not meeting eligibility criteria;
- m) all medical records and scans (e.g , CT, MRI, MRA, angiogram, etc),
- n) all documents regarding scheduling of interviews and collection of information from all study participants,
- o) all product identification books, photographs, and charts,
- p) all drug containers and drug labels furnished by study participants;
- q) all documents related to observations of interviews,
- r) all documents related to the assignment of interviewers,
- s) all documents related to surrogate/proxy interviews,
- t) all documents related to the use or handling of data or information obtained from surrogate/proxy interviews,
- u) all data abstraction forms,
- v) all coding forms,
- w) all documents related to codes, including their definition,

- x) all documents relating to the monitoring of sample size,
 - y) all documents related to modification of any aspect of the HSP;
 - z) every participating subject's folder and all contents of the folder;
 - aa) all audio tapes of interviews of study subjects,
 - bb) all financial reports, and
 - cc) all documents regarding the disbursement of funds
- 11 All documents regarding the proxy respondent sub-study
- 12 All documents regarding communications concerning the HSP including, but not limited to, all documents regarding communications
- a) between persons participating in the conduct of the HSP (For purposes of this Item 12, "conduct" is defined to including without limitation the design of the HSP, analysis of data, variations of or amendments to the HSP protocol variations, and the drafting or revision of abstracts, summaries, manuscripts and/or submissions relating to the HSP);
 - b) between anyone involved in the conduct of the HSP and any other person or organization including, but not limited to, yourself, the Food and Drug Administration, the Nonprescription Drug Manufacturers Association, the Consumer Healthcare Products Association, any member of the Scientific Advisory Group, pharmaceutical companies, and/or any of their current or former employees, members or representatives,
 - c) between anyone involved in the conduct of the HSP and any person claiming injury from use of PPA-containing medication;
 - d) with physician investigators,
 - e) with participating hospitals including, but not limited to, communications with the surveillance officers and the admissions offices at the participating hospitals,
 - f) with the Principal Investigator at each participating study site,
 - g) with each case's physician,

- h) with any medical or scientific journals including, without limitation, the New England Journal of Medicine;
 - i) with any physicians, epidemiologists, statisticians, or other professionals asked by any person or entity (including, but not limited to, the New England Journal of Medicine) to conduct a peer review of the study and its results,
 - j) between HSP investigators and any member of the Scientific Advisory Group,
 - k) between HSP investigators and the New England Journal of Medicine, and
 - l) with any other person at any of the participating institutions
- 13. All documents related to the Scientific Advisory Group including, but not limited to, communications, reports, site visits, and travel expenses.
- 14. All documents regarding the handling, calculations, or use of any and all data obtained regarding the HSP including, but not limited to:
 - a) all electronic analysis files,
 - b) all documents related to interim data analysis;
 - c) all final analysis files, and
 - d) all data access logs;
 - e) all database dictionary files,
 - f) all data collection instruments;
 - g) all databases constructed from the questionnaires;
 - h) all databases for each intermediate and final analysis that relates to the Final Report and the New England Journal of Medicine article;
 - i) all analyses not included in the Final Report or the New England Journal of Medicine Article,
 - j) all analyses done after receipt of comments from or on behalf of CHPA or any predecessor organization of CHPA,

- k) all documents concerning the use of and/or difference between data analysis via a one-tailed or two-tailed statistical test;
 - l) all documents concerning the adjustment of variables and analyses used for the adjustment of variables.
- 15 All documents regarding the Final Report of the HSP and its preparation including, but not limited to, all communications, comments and drafts
- 16 All documents regarding the publication of the HSP in the New England Journal of Medicine, including but not limited to correspondence dated after publication of the HSP in the New England Journal of Medicine
- 17 All documents evidencing revisions, changes, additions, or deletions made to the Final Report of the HSP (and/or the data contained in that report) prior to the publication of the study's results in the New England Journal of Medicine
- 18. All documents regarding conferences, discussions, or meetings with FDA regarding the HSP, including, without limitation, documents concerning preparations for October 19, 2000 hearing.
- 19 All documents relating to any comments about, or criticisms of, The HSP from any source including, without limitations, letters to the editor concerning the HSP
- 20 All documents regarding the Authors' Reply published in the April 5, 2001 New England Journal of Medicine including, but not limited to, all data analyses and communications with anyone after publication.
- 21. All documents relating to the removal or refiling of any document responsive to any of the above categories

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 OCT -4 PM 4:06
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
*
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*

**CROSS-NOTICE OF VIDEOTAPED
DEPOSITION OF RALPH HORWITZ**

PLEASE TAKE NOTICE that pursuant to Louisiana Code of Civil Procedure Article 1429,
et seq , and in connection with *In Re Phenylpropanolamine (PPA) Products Liability Litigation*,
United States District Court, Western District of Washington, MDL Docket No 1407, defendant
SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") and other manufacturer
defendants will take the deposition of Ralph Horwitz at the Omni Hotel - New Haven, 155 Temple
Street, New Haven, CT 06510, commencing at 1 00 p m on October 9, 2002, and continuing on

Fee _____
Process _____
X DEPT 205
Clerk Dep 30
Doc No 30

October 11, 2002 (at 8 30 a m) and October 14, 2002 (at 8 30 a m), or such other places, times and dates to which the parties and the witnesses may agree A copy of the Notice of Deposition of Ralph Horwitz is attached hereto as Exhibit A

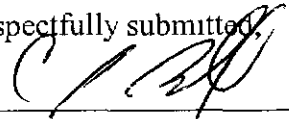
PLEASE TAKE FURTHER NOTICE that the witness has been directed to produce for inspection, copying and use at the deposition the documents and things described in the attachment to Exhibit A

This deposition will be recorded by videotape as well as by stenographic means by the court reporting firm of Tate & Tate, Inc , 180 Tuckerton Road, Suite 5, The Lexington Building, Medford, NJ 08055

You are invited to attend and cross-examine the witness

Dated this 2nd day of October, 2002

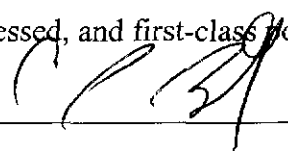
Respectfully submitted,



Mary L. Meyer, Esq (19966)
John F. Olinde (1515)
Charles P. Blanchard (18798)
**CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of October, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid



HON BARBARA JACOBS ROTHSTEIN, U S D J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | | |
|--|---|------------------------------------|
| IN RE: PHENYLPROPANOLAMINE (PPA) |) | |
| PRODUCT LIABILITY LITIGATION |) | |
| ----- |) | SUPPLEMENTAL NOTICE OF |
| |) | DEPOSITION OF RALPH HORWITZ |
| This document relates to all actions |) | Case No MDL-1407 |
| ----- |) | |
| |) | |
| and to the State Court actions to which this |) | |
| notice applies |) | |
| ----- |) | |

Pursuant to Federal Rules of Civil Procedure, Rules 26 et seq, and this Court's Order filed August 19, 2002, and in supplementation of their notice of deposition of June 10, 2002, defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") and other manufacturer defendants will take the deposition of Ralph Horwitz at the Omni Hotel - New Haven, 155 Temple Street, New Haven, CT 06510, commencing at 1 00 p m on October 9, 2002, and continuing on October 11, 2002 (at 8 30 a m) and October 14, 2002 (at 8 30 a m), or such other places, times and dates to which the parties and the witness may agree

Please take further notice that the witness has been directed to produce for inspection, copying, and use at the deposition the documents and things described in the attached Exhibit A



Please take further notice that the above deposition will be recorded by videotape as well as by stenographic means, by the firm Tate & Tate, Inc., 180 Tuckerton Road, Suite 5, The Lexington Building, Medford, New Jersey 08055

Dated September 23, 2002
Buffalo, New York

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER LLP

By 
Tamar P. Halpern, Esq.

3400 HSBC Center
Buffalo, New York 14203-2887
Telephone No : (716) 847-8400

DRINKER BIDDLE & REATH LLP

Michael J. Stortz, Esq.
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225 Bush Street
15th Floor
San Francisco, California 94104
Telephone No (415) 397-1730

Attorneys for Defendant
SmithKline Beecham Corporation d/b/a GlaxoSmithKline

TO Plaintiffs' Lead Counsel
Plaintiffs' Liaison Counsel
Defendants' Liaison Counsel
Defendants' Lead Counsel
Sarah K. Biran, Esq.
Counsel in State court actions

RECEIVED 12/05/03

EXHIBIT "A"

As used herein, the term "document" or "documents" shall mean and include any written, printed, drawn, recorded, transcribed, filed or graphic matter, however produced, reproduced, or stored on computer or otherwise electronically stored, and any originals, copies, drafts, revisions, or amendments thereof. "Document" or "Documents" shall include, by way of example and without limitation, letters, memoranda, notes, e-mails, test data, charts, x-rays, reports, medical records, records of payment, diagrams, manuals, test procedures, sketches, graphs, prints, secretarial notes, work pads, diaries, films, tapes, videotapes, photographs, computer disks, computer printouts, computer memory banks, books, publications, literature, announcements, or other writings or tangible objects. Further, "document" or "documents" requested herein extend to and include any and all such materials within the possession, custody, or control of you and your agents, attorneys, or representatives, regardless of where located. For any document withheld from production, and any document redacted in any manner, please identify the document withheld or redacted by date, author, type of document, subject matter, recipient, and any grounds for withholding or redaction of the document. You are to produce the materials in your possession, custody, or control listed below:

1. All documents related to the initiation of the Yale Hemorrhagic Stroke Project (hereinafter "HSP").
2. All documents related to the organizational structure of persons involved in the HSP
3. All documents relating to the study personnel's experience and credentials (including but not limited to the curriculum vitae of each professional who participated in the study).
4. All medical literature and case reports that were considered, reviewed, relied upon, and/or utilized in any manner by you or by any investigator or other personnel involved in the HSP from the inception of the HSP until its publication in the New England Journal of Medicine.
5. All documents related to the Protocol for the HSP including, but not limited to:
 - a) all documents related to the creation or development of the Protocol,
 - b) all documents related to the estimation of the sample size, including MRI market research data,
 - c) all documents related to or containing communications with anyone regarding the Protocol;
 - d) all documents related to comments, revisions, or modifications to the Protocol, and

- e) all drafts of the protocol.
- 6 All documents related to obtaining Institutional Review Board Approval of the HSP
- 7 All documents related to the conduct of the HSP including, but not limited to:
- a) all documents regarding or concerning the network of participating hospitals;
 - b) all documents regarding the recruitment of investigators, hospitals, and all persons involved in any way in the HSP;
 - c) all procedure manuals and all investigator's brochures; and
 - d) all documents regarding the training of any and all persons involved in the HSP, including but not limited to training manuals, training videotapes, training attendance, identity of trainers, and confirmation of training.
- 8 All documents related to the ascertainment of cases in the HSP including, but not limited to, all documents regarding:
- a) the active surveillance program;
 - b) the surveillance team;
 - c) the case definition;
 - d) methods of case ascertainment; and
 - e) exclusion criteria.
9. All documents related to the selection of controls in the HSP including, but not limited to, all documents regarding the use of random digit dialing and all documents concerning telephone numbers that did not result in an eligible person or control.
- 10 All documents related to data collection and processing in the HSP including, but not limited to:
- a) all data collection forms,
 - b) all interview data forms,

- c) *training manuals for interviewers;*
- d) *data logs regarding cases and controls;*
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- f) *all potential control forms;*
- g) *all log-in records;*
- h) *all data editing, coding and validation manuals;*
- i) *all screening questionnaires;*
- j) *all documents and records reviewed by a panel of stroke neurologists involved in the determination of whether eligibility criteria were met;*
- k) *all documents and records reviewed or generated by study physicians;*
- l) *all documents and records, including logs, regarding stroke patients rejected as not meeting eligibility criteria;*
- m) *all medical records and scans (e.g., CT, MRI, MRA, angiogram, etc.);*
- n) *all documents regarding scheduling of interviews and collection of information from all study participants;*
- o) *all product identification books, photographs, and charts;*
- p) *all drug containers and drug labels furnished by study participants;*
- q) *all documents related to observations of interviews;*
- r) *all documents related to the assignment of interviewers;*
- s) *all documents related to surrogate/proxy interviews,*
- t) *all documents related to the use or handling of data or information obtained from surrogate/proxy interviews;*
- u) *all data abstraction forms;*
- v) *all coding forms,*
- w) *all documents related to codes, including their definition;*

- x) all documents relating to the monitoring of sample size;
 - y) all documents related to modification of any aspect of the HSP;
 - z) every participating subject's folder and all contents of the folder;
 - aa) all audio tapes of interviews of study subjects;
 - bb) all financial reports; and
 - cc) all documents regarding the disbursement of funds.
- 11 All documents regarding the proxy respondent sub-study.
12. All documents regarding communications concerning the HSP including, but not limited to, all documents regarding communications:
- a) between persons participating in the conduct of the HSP. (For purposes of this Item 12, "conduct" is defined to including without limitation the design of the HSP, analysis of data, variations of or amendments to the HSP protocol variations, and the drafting or revision of abstracts, summaries, manuscripts and/or submissions relating to the HSP);
 - b) between anyone involved in the conduct of the HSP and any other person or organization including, but not limited to, yourself, the Food and Drug Administration, the Nonprescription Drug Manufacturers Association, the Consumer Healthcare Products Association, any member of the Scientific Advisory Group, pharmaceutical companies, and/or any of their current or former employees, members or representatives,
 - c) between anyone involved in the conduct of the HSP and any person claiming injury from use of PPA-containing medication;
 - d) with physician investigators;
 - e) with participating hospitals including, but not limited to, communications with the surveillance officers and the admissions offices at the participating hospitals,
 - f) with the Principal Investigator at each participating study site;
 - g) with each case's physician;

- h) with any medical or scientific journals including, without limitation, the New England Journal of Medicine;
 - i) with any physicians, epidemiologists, statisticians, or other professionals asked by any person or entity (including, but not limited to, the New England Journal of Medicine) to conduct a peer review of the study and its results;
 - j) between HSP investigators and any member of the Scientific Advisory Group;
 - k) between HSP investigators and the New England Journal of Medicine; and
 - l) with any other person at any of the participating institutions
13. All documents related to the Scientific Advisory Group including, but not limited to, communications, reports, site visits, and travel expenses.
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- a) all electronic analysis files;
 - b) all documents related to interim data analysis;
 - c) all final analysis files; and
 - d) all data access logs;
 - e) all database dictionary files;
 - f) all data collection instruments;
 - g) all databases constructed from the questionnaires;
 - h) all databases for each intermediate and final analysis that relates to the Final Report and the New England Journal of Medicine article;
 - i) all analyses not included in the Final Report or the New England Journal of Medicine Article;
 - j) all analyses done after receipt of comments from or on behalf of CHPA or any predecessor organization of CHPA;

- k) all documents concerning the use of and/or difference between data analysis via a one-tailed or two-tailed statistical test,
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- 19. All documents relating to any comments about, or criticisms of, The HSP from any source including, without limitations, letters to the editor concerning the HSP.
- 20. All documents regarding the Authors' Reply published in the April 5, 2001 New England Journal of Medicine including, but not limited to, all data analyses and communications with anyone after publication.
- 21. All documents relating to the removal or refile of any document responsive to any of the above categories.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 OCT -4 PM 4:06
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
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* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
*
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*

**CROSS-NOTICE OF VIDEOTAPED
DEPOSITION OF CATHERINE VISCOLI**

PLEASE TAKE NOTICE that pursuant to Louisiana Code of Civil Procedure Article 1429, et seq , and in connection with *In Re Phenylpropanolamine (PPA) Products Liability Litigation*, United States District Court, Western District of Washington, MDL Docket No 1407, defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") and other manufacturer defendants will take the deposition of Catherine Viscoli at the Omni Hotel - New Haven, 155 Temple Street, New Haven, CT 06510, commencing at 9 00 a m on October 21, 2002, and

Fee _____
Process _____
X Dkt'd _____
Clerk's _____
Doc No. _____

continuing on October 22, 2002 (at 9 00 a m) and October 23, 2002 (at 9 00 a m), or such other places, times and dates to which the parties and the witnesses may agree A copy of the Notice of Deposition of Catherine Viscoli is attached hereto as Exhibit A

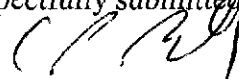
PLEASE TAKE FURTHER NOTICE that the witness has been directed to produce for inspection, copying and use at the deposition the documents and things described in the attachment to Exhibit A

This deposition will be recorded by videotape as well as by stenographic means by the court reporting firm of Tate & Tate, Inc , 180 Tuckerton Road, Suite 5, The Lexington Building, Medford, NJ 08055

You are invited to attend and cross-examine the witness

DATED this 2nd day of October, 2002

Respectfully submitted,



Mary L Meyer, Esq (19966)

John F Olinde (1515)

Charles P Blanchard (18798)

CHAFFE, MCCALL, PHILLIPS,

TOLER & SARPY, L.L.P.

2300 Energy Centre, 1100 Poydras Street

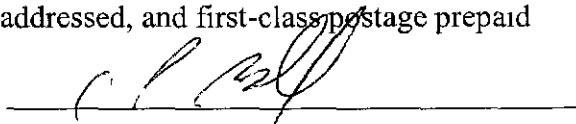
New Orleans, LA 70163-2300

Telephone (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of October, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid



HON' BARBARA JACOBS ROTHSTEIN, U S D J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE PHENYLPROPANOLAMINE (PPA))
PRODUCT LIABILITY LITIGATION)

SUPPLEMENTAL NOTICE OF
DEPOSITION OF
CATHERINE VISCOLI

-----)
This document relates to all actions)

-----)
and to the State Court actions to which this)
notice applies)
-----)

Case No MDL-1407

Pursuant to Federal Rules of Civil Procedure, Rules 26 et seq, and this Court's Order filed August 19, 2002, and in supplementation of their notice of deposition of June 10, 2002, defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") and other manufacturer defendants will take the deposition of Catherine Viscoli at the Omni Hotel - New Haven, 155 Temple Street, New Haven, CT 06510, commencing at 9 00 a m on October 21, 2002, and continuing on October 22, 2002 (at 9 00 a m) and October 23, 2002 (at 9 00 a m), or such other places, times and dates to which the parties and the witness may agree

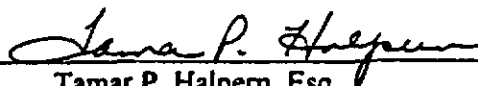
Please take further notice that the witness has been directed to produce for inspection, copying, and use at the deposition the documents and things described in the attached Exhibit A



Please take further notice that the above deposition will be recorded by videotape as well as by stenographic means, by the firm Tate & Tate, Inc., 180 Tuckerton Road, Suite 5, The Lexington Building, Medford, New Jersey 08055

Dated September 23, 2002
Buffalo, New York

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER LLP

By 
Tamar P. Halpern, Esq
3400 HSBC Center
Buffalo, New York 14203-2887
Telephone No : (716) 847-8400

DRINKER BIDDLE & REATH LLP
Michael J. Stortz, Esq
Charles F. Preuss, Esq
225 Bush Street
15th Floor
San Francisco, California 94104
Telephone No (415) 397-1730

Attorneys for Defendant
SmithKline Beecham Corporation d/b/a GlaxoSmithKline

TO Plaintiffs' Lead Counsel
Plaintiffs' Liaison Counsel
Defendants' Liaison Counsel
Defendants' Lead Counsel
Sarah K. Biran, Esq
Counsel in State court actions

BUFILE 12-90518-1

EXHIBIT "A"

As used herein, the term "document" or "documents" shall mean and include any written, printed, drawn, recorded, transcribed, filed or graphic matter, however produced, reproduced, or stored on computer or otherwise electronically stored, and any originals, copies, drafts, revisions, or amendments thereof. "Document" or "Documents" shall include, by way of example and without limitation, letters, memoranda, notes, e-mails, test data, charts, x-rays, reports, medical records, records of payment, diagrams, manuals, test procedures, sketches, graphs, prints, secretarial notes, work pads, diaries, films, tapes, videotapes, photographs, computer disks, computer printouts, computer memory banks, books, publications, literature, announcements, or other writings or tangible objects. Further, "document" or "documents" requested herein extend to and include any and all such materials within the possession, custody, or control of you and your agents, attorneys, or representatives, regardless of where located. For any document withheld from production, and any document redacted in any manner, please identify the document withheld or redacted by date, author, type of document, subject matter, recipient, and any grounds for withholding or redaction of the document. You are to produce the materials in your possession, custody, or control listed below:

1. All documents related to the initiation of the Yale Hemorrhagic Stroke Project (hereinafter "HSP").
2. All documents related to the organizational structure of persons involved in the HSP.
3. All documents relating to the study personnel's experience and credentials (including but not limited to the curriculum vitae of each professional who participated in the study).
4. All medical literature and case reports that were considered, reviewed, relied upon, and/or utilized in any manner by you or by any investigator or other personnel involved in the HSP from the inception of the HSP until its publication in the New England Journal of Medicine.
5. All documents related to the Protocol for the HSP including, but not limited to:
 - a) all documents related to the creation or development of the Protocol;
 - b) all documents related to the estimation of the sample size, including MRI market research data;
 - c) all documents related to or containing communications with anyone regarding the Protocol;
 - d) all documents related to comments, revisions, or modifications to the Protocol; and

- e) all drafts of the protocol.
- 6 All documents related to obtaining Institutional Review Board Approval of the HSP.
 7. All documents related to the conduct of the HSP including, but not limited to:
 - a) all documents regarding or concerning the network of participating hospitals;
 - b) all documents regarding the recruitment of investigators, hospitals, and all persons involved in any way in the HSP;
 - c) all procedure manuals and all investigator's brochures; and
 - d) all documents regarding the training of any and all persons involved in the HSP, including but not limited to training manuals, training videotapes, training attendance, identity of trainers, and confirmation of training.
 - 8 All documents related to the ascertainment of cases in the HSP including, but not limited to, all documents regarding:
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 - b) the surveillance team;
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- c) *training manuals for interviewers;*
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- i) *all screening questionnaires;*
- j) *all documents and records reviewed by a panel of stroke neurologists involved in the determination of whether eligibility criteria were met;*
- k) *all documents and records reviewed or generated by study physicians;*
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- x) all documents relating to the monitoring of sample size,
 - y) all documents related to modification of any aspect of the HSP;
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- a) between persons participating in the conduct of the HSP. (For purposes of this Item 12, "conduct" is defined to including without limitation the design of the HSP, analysis of data, variations of or amendments to the HSP protocol variations, and the drafting or revision of abstracts, summaries, manuscripts and/or submissions relating to the HSP);
 - b) between anyone involved in the conduct of the HSP and any other person or organization including, but not limited to, yourself, the Food and Drug Administration, the Nonprescription Drug Manufacturers Association, the Consumer Healthcare Products Association, any member of the Scientific Advisory Group, pharmaceutical companies, and/or any of their current or former employees, members or representatives;
 - c) between anyone involved in the conduct of the HSP and any person claiming injury from use of PPA-containing medication;
 - d) with physician investigators;
 - e) with participating hospitals including, but not limited to, communications with the surveillance officers and the admissions offices at the participating hospitals,
 - f) with the Principal Investigator at each participating study site;
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- h) with any medical or scientific journals including, without limitation, the New England Journal of Medicine;
 - i) with any physicians, epidemiologists, statisticians, or other professionals asked by any person or entity (including, but not limited to, the New England Journal of Medicine) to conduct a peer review of the study and its results,
 - j) between HSP investigators and any member of the Scientific Advisory Group, ..
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 16. All documents regarding the publication of the HSP in the New England Journal of Medicine, including but not limited to correspondence dated after publication of the HSP in the New England Journal of Medicine.
 17. All documents evidencing revisions, changes, additions, or deletions made to the Final Report of the HSP (and/or the data contained in that report) prior to the publication of the study's results in the New England Journal of Medicine.
 18. All documents regarding conferences, discussions, or meetings with FDA regarding the HSP, including, without limitation, documents concerning preparations for October 19, 2000 hearing.
 19. All documents relating to any comments about, or criticisms of, The HSP from any source including, without limitations, letters to the editor concerning the HSP.
 20. All documents regarding the Authors' Reply published in the April 5, 2001 New England Journal of Medicine including, but not limited to, all data analyses and communications with anyone after publication.
 21. All documents relating to the removal or refileing of any document responsive to any of the above categories.

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 UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF LOUISIANA

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MINUTE ENTRY
 ENGELHARDT, J
 SEPTEMBER 27, 2002

LORETTA G. WHYTE
 CLERK

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF LOUISIANA

DAPHINE DONNELLY

CIVIL ACTION

VERSUS

NO 02-2436

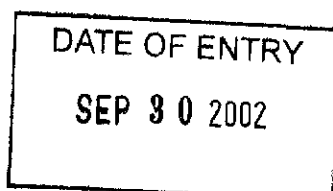
BAYER CORPORATION, ET AL

SECTION "N"

Before the Court are plaintiff's Motion to Remand [Rec Doc No 12], defendants' Motions to Dismiss [Rec Doc Nos 5, 7, 13, 14], and defendant Novartis Consumer Health, Inc 's Motion for Temporary Stay [Rec Doc No 19], presently noticed for hearing on Wednesday, October 2, 2002 at 9 30 a m Based upon the reasoning set out in *Benjamin v Bayer Corp.*, No 02-886 (E D La May 16, 2002) (Vance, J), a copy of which is attached hereto, it is the opinion of this Court that this matter should be TEMPORARILY STAYED pending a final ruling of the Judicial Panel on Multidistrict Litigation on transfer of this case to Multidistrict Litigation, *In re Phenylpropanolamine (PPA) Litigation*, 173 F Supp 2d 1377 (J P M L 2001) Because the issues involved in the plaintiff's Motion to Remand and the defendants' Motions to Dismiss are likely to common to other cases transferred to MDL No 1407, and the policies of efficiency and consistency of pre-trial rulings are furthered by a temporary stay, the Court **GRANTS** the **Motion for Temporary Stay** filed on behalf of Novartis Consumer Health, Inc [Rec Doc No 19]

IT IS SO ORDERED.


 UNITED STATES DISTRICT JUDGE



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EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KATHERINE BENJAMIN

CIVIL ACTION

VERSUS

NO: 02-0886

BAYER CORPORATION, ET AL.

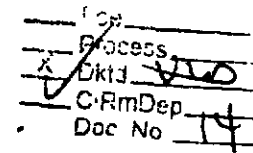
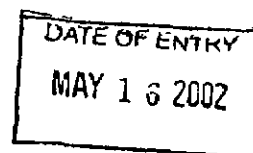
SECTION: "R"

ORDER AND REASONS

Before the Court is defendants' motion for a stay. For the following reasons, the Court grants the motion.

I. BACKGROUND

On November 7, 2001, Katherine Benjamin filed a petition for damages in state court against the Bayer Corporation, Glaxo Smithkline PLC, Bristol-Meyers Production Division, Chattem, Inc., Walgreen Louisiana Company, Inc. (d/b/a Walgreens), and K&B of Louisiana Corporation (d/b/a "Rite Aid"). Plaintiff seeks damages for injuries she allegedly sustained as a result of ingesting Alka-Seltzer Plus Cold Medicine, Comtrex, Contac 12-Hour, and Dexatrim, four over-the-counter medications that



contain Phenylpropanolamine (PPA). Defendants removed the case to this Court on March 25, 2002, invoking the Court's diversity jurisdiction. Defendants move to stay all proceedings pending transfer by the Judicial Panel on Multidistrict Litigation. Defendants maintain that a stay is appropriate pending a determination by the MDL on whether to transfer the case to the Western District of Washington because it will conserve judicial resources, and it will avoid the risk of inconsistent pre-trial rulings. In opposition to defendants' motion, plaintiff contends that this Court is better suited to rule on the issues of Louisiana law implicated in plaintiff's complaint and in plaintiff's pending motion to remand. Plaintiff also contends that a stay will delay the matter and cause her unnecessary expense.

II. DISCUSSION

"The pendency of the transfer order does not in any way defeat or limit the authority of this Court to rule upon matters properly presented to it for decision." *Calvin Boudreaux v. Metropolitan Life Ins. Co.*, 1995 WL 83788, *1 (E.D. La. 1995) (citing *In re Air Crash at Paris, France*, 376 F.Supp. 887 (JPML 1974)). The decision whether to stay proceedings is discretionary, and the exercise of discretion is guided by the policies of justice and efficiency. *Id.*

Judicial economy would be served by a stay pending the transfer if the issues involved in the remand motion are likely to arise in the cases that have been or will be transferred to the Western District of Washington. *In re Ivy*, 901 F.2d 7, 9 (2d Cir 1990). The transferee judge "certainly has the power to determine the question of remand," and if the remand issues are common to many of the PPA cases, decisions by the transferee judge would avoid "duplicative discovery and conflicting pretrial rulings." Calvin Boudreaux, 1995 WL 83788 at *2 (quoting *In re Air Crash Disaster at Florida*, 368 F.Supp. 812, 813 (JPML 1973)).

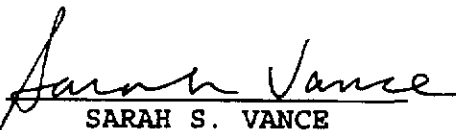
Here, defendants challenge the joinder of the nondiverse defendants, Walgreens and K&B, on a number of grounds. For example, defendants claim that some of plaintiff's Louisiana redhibition claims are time-barred and that even viewing the undisputed facts in the light most favorable to plaintiff, no reasonable basis exists under which plaintiff could prevail against the nondiverse defendants. As Magistrate Judge Kirk noted in a ruling on a motion to stay in a PPA case in the Western District of Louisiana, there are numerous cases in districts throughout Louisiana alleging damages as a result of the ingestion of PPA in which the plaintiffs assert Louisiana redhibition claims against nondiverse retail sellers. See Bayer's Ex. N, *James Bowman v. Bayer Corporation, et al.*, No. 01-

1802-A, at 2. Additionally, a number of cases involving PPA have been consolidated and transferred to the Western District of Washington, including a case out of the Western District of Louisiana, and many other Louisiana cases have been conditionally transferred and await a final ruling. See Bayer's Ex B, *In re Phenylpropanolamine (PPA) Products Liability Litigation*, Transfer Order, MDL No. 1407, August 28, 2001. The Court finds that because the issues involved in this remand are likely to be common to other transferred cases, the policies of efficiency and consistency of pre-trial rulings are furthered by a stay of the proceedings in this Court pending a decision on the transfer of this case to the MDL.

III. Conclusion

For the foregoing reasons, the Court GRANTS defendants' motion for a stay of the proceedings.

New Orleans, Louisiana, this 16th day of May, 2002.


SARAH S. VANCE
UNITED STATES DISTRICT JUDGE



CASE 2:02-cv-02436
DOCUMENT 28
DATE 09/30/02

CLERK: tbl

Notices sent to:

J. Loupe by fax to 225-767-9003
Dana Kirk by mail.
Clayton Clark by mail.
J Davis by mail.
Mary Meyer by fax to 504-544-6077
Joy Braun by fax to 504-582-1555
C Bradley Jr. by fax to 504-584-9142
Jack Truitt by fax to 985-792-1065

Document scanned by:

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LORLEIA G. WHITE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION;
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO.,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
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*

**CROSS-NOTICE OF VIDEOTAPED
DEPOSITION OF LAWRENCE M. BRASS**

PLEASE TAKE NOTICE that pursuant Federal Rules of Civil Procedure, Rules
27, *et seq* , and in connection with *In Re Phenylpropanolamine (PPA) Products Liability
Litigation*, United States District Court, Western District of Washington, MDL Docket
No. 1407, defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline (GSK)
and other manufacturer defendants will take the deposition of Lawrence M Brass at the

Fee _____
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X Dkt'd _____
Clerk Dep _____
Doc. No. _____

Omni Hotel - New Haven, 155 Temple Street, New Haven, CT 06510, commencing at 9 00 a.m on October 1, 2002, and continuing on October 4, 2002 (at 9 00 a m) and October 10, 2002 (at 9 00 a m), or such other places, times and dates to which the parties and the witnesses may agree A copy of the Notice of Deposition of Lawrence M Brass is attached hereto as Exhibit A

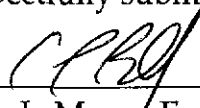
PLEASE TAKE FURTHER NOTICE that the witness has been directed to produce for inspection, copying and use at the deposition the documents and things described in the attachment to Exhibit A

This deposition will be recorded by videotape as well as by stenographic means by the court reporting firm of Tate & Tate, Inc , 180 Tuckerton Road, Suite 5, The Lexington Building, Medford, NJ 08055

You are invited to attend and cross-examine the witness

DATED this 24th day of September, 2002

Respectfully submitted,



Mary L. Meyer, Esq (19966)
John F Olinde (1515)
Charles P Blanchard (18798)
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid

CPA

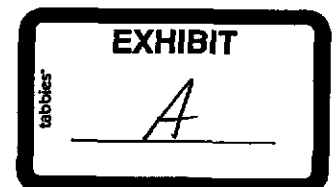
HON BARBARA JACOBS ROTHSTEIN U S D J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | | |
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| IN RE PHENYLPROPANOLAMINE (PPA) |) | |
| PRODUCT LIABILITY LITIGATION |) | |
| ----- |) | SUPPLEMENTAL NOTICE OF |
| |) | DEPOSITION OF LAWRENCE M. BRASS |
| |) | |
| This document relates to all actions |) | Case No MDL-1407 |
| ----- |) | |
| |) | |
| and to the State Court actions to which this |) | |
| notice applies |) | |
| ----- |) | |

Pursuant to Federal Rules of Civil Procedure, Rules 26 et seq, and this Court's Order filed August 19, 2002, and in supplementation of their notice of deposition of June 10, 2002, defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") and other manufacturer defendants will take the deposition of Lawrence M Brass at the Omni Hotel - New Haven, 155 Temple Street, New Haven, CT 06510, commencing at 9 00 a m on October 1, 2002, and continuing on October 4, 2002 (at 9 00 a m) and October 10, 2002 (at 9 00 a m), or such other places, times and dates to which the parties and the witness may agree

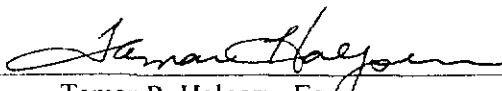
Please take further notice that the witness has been directed to produce for inspection, copying, and use at the deposition the documents and things described in the attached Exhibit A



Please take further notice that the above deposition will be recorded by videotape as well as by stenographic means, by the firm Tate & Tate, Inc., 180 Tuckerton Road, Suite 5, The Lexington Building Medford, New Jersey 08055

Dated September 10, 2002
Buffalo New York

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER LLP

By 
Tamar P. Halpern, Esq.
3400 HSBC Center
Buffalo, New York 14203-2887
Telephone No (716) 847-8400

DRINKER BIDDLE & REATH LLP
Michael J. Stortz, Esq.
Charles F. Preuss, Esq.
225 Bush Street
15th Floor
San Francisco, California 94104
Telephone No (415) 397-1730

Attorneys for Defendant
SmithKline Beecham Corporation d/b/a GlaxoSmithKline

TO Plaintiffs' Lead Counsel
Plaintiffs' Liaison Counsel
Defendants' Lead Counsel
Defendants' Liaison Counsel
Counsel in State court actions

EXHIBIT "A"

As used herein, the term "document" or "documents" shall mean and include any written, printed, drawn, recorded, transcribed, filed or graphic matter, however produced, reproduced, or stored on computer or otherwise electronically stored, and any originals, copies, drafts, revisions, or amendments thereof. "Document" or "Documents" shall include, by way of example and without limitation, letters, memoranda, notes, e-mails, test data, charts, x-rays, reports, medical records, records of payment, diagrams, manuals, test procedures, sketches, graphs, prints, secretarial notes, work pads, diaries, films, tapes, videotapes, photographs, computer disks, computer printouts, computer memory banks, books, publications, literature, announcements, or other writings or tangible objects. Further, "document" or "documents" requested herein extend to and include any and all such materials within the possession, custody, or control of you and your agents, attorneys, or representatives, regardless of where located. For any document withheld from production, and any document redacted in any manner, please identify the document withheld or redacted by date, author, type of document, subject matter, recipient, and any grounds for withholding or redaction of the document. You are to produce the materials in your possession, custody, or control listed below.

- 1 All documents related to the initiation of the Yale Hemorrhagic Stroke Project (hereinafter "HSP")
- 2 All documents related to the organizational structure of persons involved in the HSP
- 3 All documents relating to the study personnel's experience and credentials (including but not limited to the curriculum vitae of each professional who participated in the study)
- 4 All medical literature and case reports that were considered, reviewed, relied upon, and/or utilized in any manner by you or by any investigator or other personnel involved in the HSP from the inception of the HSP until its publication in the New England Journal of Medicine
- 5 All documents related to the Protocol for the HSP including, but not limited to
 - a) all documents related to the creation or development of the Protocol,
 - b) all documents related to the estimation of the sample size, including MRI market research data,
 - c) all documents related to or containing communications with anyone regarding the Protocol,
 - d) all documents related to comments, revisions, or modifications to the Protocol, and

- e) all drafts of the protocol
- 6 All documents related to obtaining Institutional Review Board Approval of the HSP
- 7 All documents related to the conduct of the HSP including, but not limited to
- a) all documents regarding or concerning the network of participating hospitals,
 - b) all documents regarding the recruitment of investigators, hospitals, and all persons involved in any way in the HSP,
 - c) all procedure manuals and all investigator's brochures, and
 - d) all documents regarding the training of any and all persons involved in the HSP, including but not limited to training manuals, training videotapes, training attendance, identity of trainers, and confirmation of training
- 8 All documents related to the ascertainment of cases in the HSP including, but not limited to, all documents regarding
- a) the active surveillance program,
 - b) the surveillance team,
 - c) the case definition,
 - d) methods of case ascertainment, and
 - e) exclusion criteria
- 9 All documents related to the selection of controls in the HSP including, but not limited to, all documents regarding the use of random digit dialing and all documents concerning telephone numbers that did not result in an eligible person or control
- 10 All documents related to data collection and processing in the HSP including, but not limited to
- a) all data collection forms,
 - b) all interview data forms,

- c) training manuals for interviewers,
- d) data logs regarding cases and controls,
- e) all case identification forms,
- f) all potential control forms,
- g) all log-in records,
- h) all data editing, coding and validation manuals,
- i) all screening questionnaires,
- j) all documents and records reviewed by a panel of stroke neurologists involved in the determination of whether eligibility criteria were met,
- k) all documents and records reviewed or generated by study physicians,
- l) all documents and records, including logs, regarding stroke patients rejected as not meeting eligibility criteria,
- m) all medical records and scans (e g , CT, MRI, MRA, angiogram, etc),
- n) all documents regarding scheduling of interviews and collection of information from all study participants,
- o) all product identification books, photographs, and charts,
- p) all drug containers and drug labels furnished by study participants,
- q) all documents related to observations of interviews,
- r) all documents related to the assignment of interviewers,
- s) all documents related to surrogate/proxy interviews,
- t) all documents related to the use or handling of data or information obtained from surrogate/proxy interviews,
- u) all data abstraction forms,
- v) all coding forms,
- w) all documents related to codes, including their definition,

- x) all documents relating to the monitoring of sample size,
 - y) all documents related to modification of any aspect of the HSP,
 - z) every participating subject's folder and all contents of the folder,
 - aa) all audio tapes of interviews of study subjects,
 - bb) all financial reports, and
 - cc) all documents regarding the disbursement of funds
- 11 All documents regarding the proxy respondent sub-study
- 12 All documents regarding communications concerning the HSP including, but not limited to, all documents regarding communications
- a) between persons participating in the conduct of the HSP (For purposes of this Item 12, "conduct" is defined to including without limitation the design of the HSP, analysis of data, variations of or amendments to the HSP protocol variations, and the drafting or revision of abstracts, summaries, manuscripts and/or submissions relating to the HSP),
 - b) between anyone involved in the conduct of the HSP and any other person or organization including, but not limited to, yourself, the Food and Drug Administration, the Nonprescription Drug Manufacturers Association, the Consumer Healthcare Products Association, any member of the Scientific Advisory Group, pharmaceutical companies, and/or any of their current or former employees, members or representatives,
 - c) between anyone involved in the conduct of the HSP and any person claiming injury from use of PPA-containing medication,
 - d) with physician investigators,
 - e) with participating hospitals including, but not limited to, communications with the surveillance officers and the admissions offices at the participating hospitals,
 - f) with the Principal Investigator at each participating study site,
 - g) with each case's physician,

- h) with any medical or scientific journals including, without limitation, the New England Journal of Medicine,
 - i) with any physicians, epidemiologists, statisticians, or other professionals asked by any person or entity (including, but not limited to, the New England Journal of Medicine) to conduct a peer review of the study and its results,
 - j) between HSP investigators and any member of the Scientific Advisory Group,
 - k) between HSP investigators and the New England Journal of Medicine, and
 - l) with any other person at any of the participating institutions
- 13 All documents related to the Scientific Advisory Group including, but not limited to, communications, reports, site visits, and travel expenses
- 14 All documents regarding the handling, calculations, or use of any and all data obtained regarding the HSP including, but not limited to
- a) all electronic analysis files,
 - b) all documents related to interim data analysis,
 - c) all final analysis files, and
 - d) all data access logs,
 - e) all database dictionary files,
 - f) all data collection instruments,
 - g) all databases constructed from the questionnaires,
 - h) all databases for each intermediate and final analysis that relates to the Final Report and the New England Journal of Medicine article,
 - i) all analyses not included in the Final Report or the New England Journal of Medicine Article,
 - j) all analyses done after receipt of comments from or on behalf of CHPA or any predecessor organization of CHPA,

- k) all documents concerning the use of and/or difference between data analysis via a one-tailed or two-tailed statistical test,
 - l) all documents concerning the adjustment of variables and analyses used for the adjustment of variables
- 15 All documents regarding the Final Report of the HSP and its preparation including, but not limited to, all communications, comments and drafts
 - 16 All documents regarding the publication of the HSP in the New England Journal of Medicine, including but not limited to correspondence dated after publication of the HSP in the New England Journal of Medicine
 - 17 All documents evidencing revisions, changes, additions, or deletions made to the Final Report of the HSP (and/or the data contained in that report) prior to the publication of the study's results in the New England Journal of Medicine
 - 18 All documents regarding conferences, discussions, or meetings with FDA regarding the HSP, including, without limitation, documents concerning preparations for October 19, 2000 hearing
 - 19 All documents relating to any comments about, or criticisms of, The HSP from any source including, without limitations, letters to the editor concerning the HSP
 - 20 All documents regarding the Authors' Reply published in the April 5, 2001 New England Journal of Medicine including, but not limited to, all data analyses and communications with anyone after publication
 - 21 All documents relating to the removal or refiling of any document responsive to any of the above categories

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EASTERN DISTRICT OF LOUISIANA

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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

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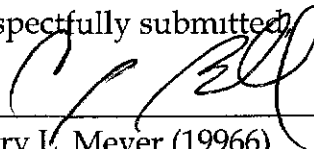
**BAYER CORPORATION'S MOTION FOR TEMPORARY STAY OF
PROCEEDINGS PENDING A FINAL RULING OF THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION ON TRANSFER OF THIS CASE TO MDL-1407**

For the reasons detailed in the attached memorandum in support and those cited by this Court in other cases involving Phenylpropanolamine (PPA), Bayer Corporation moves this Court to temporarily stay all proceedings in this matter pending a final ruling of the Judicial Panel on Multidistrict Litigation on transfer of this case to MDL-1407. A stay will further the goals of judicial efficiency and consistency by avoiding duplicative

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proceedings and conflicting pretrial rulings Further, it will not prejudice the parties, but rather will benefit both them and the Court

Respectfully submitted,



Mary L. Meyer (19966)

John F. Olinde (1515)

Charles P. Blanchard (18798)

CHAFFE, MCCALL, PHILLIPS,

TOLER & SARP, L.L.P.

2300 Energy Centre, 1100 Poydras Street

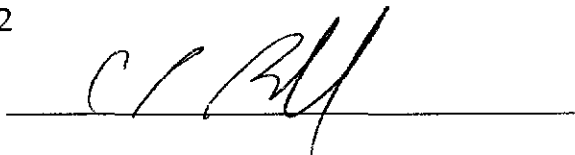
New Orleans, LA 70163-2300

Telephone: (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by hand or by depositing same in the United States Mail, postage prepaid, this 23rd day of September, 2002



UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE; SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
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**BAYER CORPORATION'S MEMORANDUM IN
SUPPORT OF MOTION FOR TEMPORARY STAY OF
PROCEEDINGS PENDING A FINAL RULING OF THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION ON TRANSFER OF THIS CASE TO MDL-1407**

Background

This is a product liability action involving Phenylpropanolamine (PPA), a substance formerly found in various nasal decongestant products. The Defendants removed this action from a Louisiana state court.

On August 28, 2001, the Judicial Panel on Multidistrict Litigation (the "Panel") issued an order consolidating 14 similar actions involving PPA in the Western District of Washington pursuant to 28 U.S.C. § 1407. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, Transfer Order, MDL No. 1407, August 28, 2001. The Panel has since issued numerous Transfer Orders conditionally transferring hundreds of other cases involving PPA to the Western District of Washington. Many of those conditional transfers have become final.

This Court and most other divisions in federal courts throughout Louisiana have stayed other similarly situated PPA cases, including cases where plaintiffs have moved to remand to state court. *See, e.g., Gasper v. Bayer Corp., et al.*, No. 02-808 (E.D. La. Apr. 10, 2002) (Engelhardt, J.) (copy attached as **Exhibit A**), *Christy v. Bayer Corp., et al.*, No. 02-577 (E.D. La. March 27, 2002) (Engelhardt, J.) (attached as **Exhibit B**), and *Benjamin v. Bayer Corp., et al.*, No. 02-886 (E.D. La. May 16, 2002) (Vance, J.) (attached as Part of **Exhibit C**). Because a stay will promote judicial efficiency, consistency in pre-trial rulings, and convenience to the parties and witnesses, this Court should temporarily stay proceedings in this case until the Panel decides by final order whether this case will be transferred to the MDL proceeding.

Argument

1. A Stay Furthers The Goals Of Judicial Efficiency and Consistency

This Court's authority to stay proceedings is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and

effort for itself, for counsel and for litigants " *Landis v North American Co.*, 299 U S 248, 254, 57 S. Ct 163, 166, 81 L. Ed 153 (1936) When a case may be transferred to an existing MDL proceeding, judicial efficiency dictates that the court exercise its authority and stay the action pending the Panel's decision on transfer. *See, e.g., Rivers v Walt Disney*, 980 F Supp 1358 (C D Cal 1997) Judicial efficiency results from a stay because if a case is later transferred to an MDL proceeding, the transferor court will have "needlessly expended its energies familiarizing itself with the intricacies of a case that would be heard by another judge [and] any efforts on behalf of [the transferor] court concerning case management will most likely have to be replicated by the judge that is assigned to handle the consolidated litigation " *Rivers*, 980 F Supp. at 1360 - 1361 For these reasons, "a majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the Panel because of the judicial resources that are conserved." *Rivers* at 1362

In *Gasper v Bayer Corporation, et al*, No 02-0808 (E D La Apr 10, 2002), a similarly situated PPA case, this Court likewise concluded that "it is in the best interest of the parties and the judicial system to temporarily stay all proceedings in this action" pending the Panel's final ruling on the transfer of the case to MDL 1407 This Court also held that a temporary stay order will not prejudice the parties, because they "will eventually have their respective motions to remand and to dismiss resolved either before the MDL Panel if the transfer is ordered, or before this Court if transfer is denied " *See Exhibit A*, attached

In *Christy v Bayer Corp , et al*, No 02-577 (E D La), this Court granted a similar stay pending the Panel's final ruling on transfer See **Exhibit B**. The Court later denied plaintiffs' motion to lift the stay in that case based on plaintiffs' challenges to the Court's jurisdiction. This Court held that "It remains the opinion of this Court that the issues raised in plaintiff's Motion to Remand should be determined by the transferee court in the event the matter is transferred to MDL No 1407 " See **Exhibit C**. Consistent with this Court's prior opinions and the goals of judicial economy and efficiency, an overwhelming majority of other Louisiana federal judges have also issued stay orders in PPA cases, despite pending motions to remand ¹

In fact, plaintiffs' counsel in this case has moved for a stay pending transfer in other PPA cases. For example, in *Barrilleaux v American Home Products Corp , et al*, No 02-170 (E D La), plaintiffs' counsel agreed that a stay would "serve both parties and [the] Court" and "would save judicial resources " See Motion attached as **Exhibit D**. While the plaintiff in *Barrilleaux* did not fraudulently join non-diverse parties or seek remand to state court, the goals of efficiency and consistency are best served by a stay even where jurisdictional issues exist. On April 15, 2002, the Judicial Panel on Multidistrict Litigation

¹ See e g , *Mercier v Ciolino Pharmacy, et al*, No 02-413, (E D La) (McNamara, J), *Craft v Whitehall-Robins Health Care, et al*, No 01-3490, (E D La) (Feldman, J), *Doreen Martin v Bayer Corporation, et al*, No 01-3477, (E D La) (Duval, J), *Garcia v SmithKline Beecham Corp , et al*, No 01-3424, (E D La) (Beer, J), *Peterson v Bayer Corp , et al*, No 01-3467 (E D La) (Fallon, J), *Victor v Bayer Corp , et al*, No 02-809 (E D La) (Berrigan, J) *Gray v Bayer Corporation, et al*, No 01-1761, (W D La) (Doherty, J), *Ashley v American Home Products Corporation, et al*, No 02-CV-239, (W D La) (Payne M J), *Ford v Whitehall-Robins*, No 02-235, (M D La) (Tyson, J), *Leatherman v Bayer Corporation, et al*, No 02-218 (Brady, J) However, Judge Lemmon, Judge Lemelle and Judge Barbier have denied similar motions to stay

rejected a plaintiff's challenge to federal jurisdiction as grounds for denying transfer to MDL-1407

Plaintiffs premise much of their opposition to transfer on their argument that federal jurisdiction is lacking in their actions. These parties urge the Panel not to order transfer before their motions are resolved by the transferor court. We note, however, that remand and other motions, if not resolved in the transferor court by the time of Section 1407 transfer, can be presented to and decided by the transferee judge. *See, e.g., In re Ivy*, 901 F.2d 7 (2nd Cir. 1990), *In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001).

See Order attached as Exhibit E

Furthermore, because the jurisdictional objections at issue in this case are common to numerous other PPA cases. Thus, the risk of inconsistent pre-trial rulings exists, likewise supporting a stay. *See Ivy v. Diamond Shamrock Chem. Co.*, 901 F.2d 7, 9 (2nd Cir. 1990) (affirming Panel's rejection of plaintiffs' request that remand motion be decided by transferor court, holding that "[t]he jurisdictional issue in question is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation," and that "[c]onsistency as well as economy is thus served" if "the jurisdictional objections [are] heard and resolved by a single court")

A stay is also appropriate because it is very likely that this case will be finally transferred to MDL-1407. A tag-along action is transferred to an existing MDL if it shares common issues of fact with the MDL cases, promotes the convenience of parties and witnesses, and advances the just and efficient conduct of the actions. *See In re Stirling Homex Corp. Sec. Litig.*, 442 F.Supp. 547, 549 (J.P.M.L. 1977), *In re Equity Funding Corp. of Am Sec. Litig.*, 397 F.Supp. 884, 884-85 (J.P.M.L. 1975). Plaintiffs' claims and allegations

concerning PPA involve numerous common issues of fact with the cases already part of the MDL

2. A Stay Does Not Unduly Prejudice The Plaintiffs

Plaintiffs will not be unduly prejudiced by a temporary stay. If plaintiffs timely oppose transfer, the Panel will address plaintiffs' objections at its next appropriate session. *See R P J P M L 7 4(d)* The delay will likely be brief and does not warrant denying Bayer's requested stay

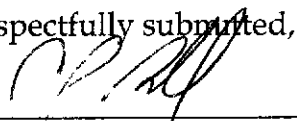
Moreover, any potential prejudice from a short delay is far outweighed by the benefits of issuing a stay that promotes judicial efficiency and avoids inconsistent results. A stay would be limited to the brief period until the Panel decides whether to transfer and consolidate the instant action in MDL-1407. At that point, the plaintiffs may proceed in the Western District of Washington if the transfer is ordered, or in this Court if the transfer is denied. Under these circumstances, the benefits of a temporary stay minimize and outweigh any potential prejudice to the plaintiffs. *See, e.g., Weinke v Microsoft Corp.*, 84 F Supp 2d 989, 990 (W D Wis 2000) (rejecting plaintiff's assertions that a stay pending resolution of transfer issues would result in a "prolonged delay" and holding that plaintiff's "cursory assertions of prejudice do not outweigh the disadvantages of litigating identical claims in a multitude of venues . . . [and] in light of the pending MDL ruling on transfer this action should be stayed in the interest of judicial economy and to avoid inconsistent results")

In contrast, Bayer will be substantially prejudiced if the Court denies the stay. A temporary stay will prevent the Bayer from incurring the unnecessary expense of engaging in duplicative pretrial proceedings. The potential for duplicative pretrial motions and jurisdictional objections represents the sort of "hardship and inequity" that courts consider when deciding a motion to stay. *See Aikins v. Microsoft Corp.*, 2000 WL 310391 at *2 (E D La March 24, 2000) (finding a stay was appropriate to avoid "considerable hardship and inequity" to a defendant faced with multiple suits, many with similar jurisdictional objections, in multiple courts). This sort of duplicative pretrial activity is exactly what the MDL proceeding in this case is designed to prevent. *See* MDL Transfer Order at p. 2.

Conclusion

For the foregoing reasons, this Court should grant Bayer's Motion for Temporary Stay of Proceedings Pending a Final Ruling of the Panel on Transfer of this Case to MDL-1407 and stay all pretrial proceedings, including, but not limited to, a stay of all hearings, disclosures, and deadlines established by the Federal Rules of Civil Procedure and Local Rules of this Court.

Respectfully submitted,



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John F. Olinde (1515)

Charles P. Blanchard (18798)

CHAFFE, MCCALL, PHILLIPS,

TOLER & SARPY, L.L.P.

2300 Energy Centre, 1100 Poydras Street

New Orleans, LA 70163-2300

Telephone (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by hand or by depositing same in the United States Mail, postage prepaid, this 23rd day of September, 2002



FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 APR 10 AM 10:35

LORETTA G. WHYTE
CLERKMINUTE ENTRY
ENGELHARDT, J.
APRIL 9, 2002UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CAROL GASPAR

CIVIL ACTION

VERSUS

NO 02-0808

BAYER CORPORATION, ET AL

SECTION "N"

Given the nature of the issues raised in the pending motions set for hearing in this case, the Court is of the opinion that it is in the best interest of the parties and the judicial system to temporarily stay all proceedings in this action pending a final ruling of the Judicial Panel on Multidistrict Litigation on Transfer to MDL-1407 -- In re Phenylpropanolamine (PPA) Products Liability Litigation. Neither the plaintiff nor the defendants are not prejudiced by this stay because the companies can bring their objections to transfer before the MDL Panel, and because the stay will only remain in effect until the MDL panel rules on the transfer. Plaintiff and the defendants, Bayer Corporation and Chattem, Inc., will eventually have their respective motions to remand and to dismiss resolved either before the MDL Panel if the transfer is ordered, or before this Court if transfer is denied. This order shall not prejudice the rights of the parties to this litigation. Accordingly,

IT IS ORDERED that the captioned matter is TEMPORARILY STAYED pending the final ruling of the Judicial Panel on Multidistrict Litigation on Transfer to MDL-1407


UNITED STATES DISTRICT JUDGE
DATE OF ENTRY
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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 MAR 27 PM 4: 25

LORETTA G. WHYTE
CLERK

MINUTE ENTRY
ENGELHARDT, J
MARCH 27, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD CHRISTY

CIVIL ACTION

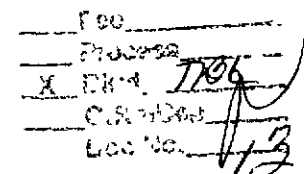
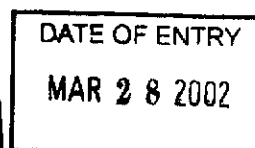
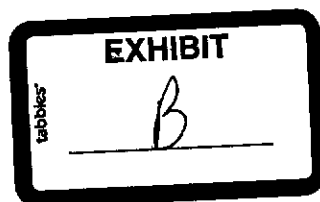
VERSUS

NO 02-0577

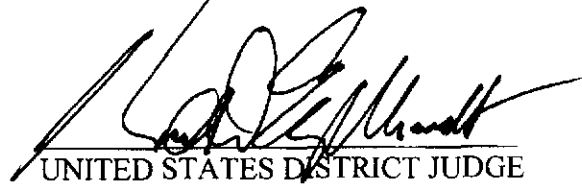
BAYER CORPORATION, ET AL

SECTION "N"

Given the nature of the issues raised in the pending motion to dismiss and motion to remand presently set for hearing in this case, the Court is of the opinion that it is in the best interest of the parties and the judicial system to temporarily stay all proceedings in this action pending a final ruling of the Judicial Panel on Multidistrict Litigation on Transfer to MDL-1407 – In re Phenylpropanolamine (PPA) Products Liability Litigation. The defendant Bayer Corporation is not prejudiced by this stay because the company can bring its objections to transfer before the MDL Panel, and because the stay will remain in effect only until the MDL panel rules on the transfer. Defendant Bayer Corporation eventually will have its Motion to Dismiss resolved and plaintiff will have his Motion to Remand resolved either before the MDL Panel, if the transfer is ordered, or before this Court if the transfer is denied. This order shall not prejudice the rights of the parties to this litigation. Accordingly,



IT IS ORDERED that the captioned matter is TEMPORARILY STAYED pending the final ruling of the Judicial Panel on Multidistrict Litigation on Transfer to MDL-1407



UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 MAY 21 PM 1:27

LORETTA G. WHYTE
CLERK

MINUTE ENTRY
ENGELHARDT, J
MAY 20, 2002

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RONALD CHRISTY

CIVIL ACTION

VERSUS

NO 02-0577

BAYER CORPORATION, ET AL

SECTION "N"

Considering Plaintiff's Motion to Lift Stay, Re-Open Case, for Costs, Attorney Fees, and for Issuance of Rule 11 Sanctions, presently set for hearing at 9 30 a m on May 29, 2002, **IT IS ORDERED** that the motion is **DENIED**, based on the reasoning set out in *Benjamin v Bayer Corp* , No 02-0886 (E D. La May 16, 2002) (Vance, J), a copy of which is attached hereto It remains the opinion of this Court that the issues raised in plaintiff's Motion to Remand, including plaintiff's request for costs and Rule 11 sanctions, should be determined by the transferee court in the event this matter is transferred to MDL No. 1407

KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

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| DATE OF ENTRY MAY 22 2002 |
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| EXHIBIT C |
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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 MAY 16 PM 3:15
LONETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KATHERINE BENJAMIN

CIVIL ACTION

VERSUS

NO: 02-0886

BAYER CORPORATION, ET AL.

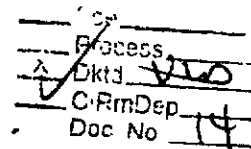
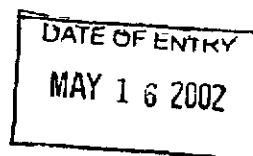
SECTION: "R"

ORDER AND REASONS

Before the Court is defendants' motion for a stay. For the following reasons, the Court grants the motion.

I. BACKGROUND

On November 7, 2001, Katherine Benjamin filed a petition for damages in state court against the Bayer Corporation, Glaxo Smithkline PLC, Bristol-Meyers Production Division, Chattem, Inc., Walgreen Louisiana Company, Inc. (d/b/a Walgreens), and K&B of Louisiana Corporation (d/b/a "Rite Aid"). Plaintiff seeks damages for injuries she allegedly sustained as a result of ingesting Alka-Seltzer Plus Cold Medicine, Comtrex, Contac 12-Hour, and Dexatrim, four over-the-counter medications that



contain Phenylpropanolamine (PPA). Defendants removed the case to this Court on March 25, 2002, invoking the Court's diversity jurisdiction. Defendants move to stay all proceedings pending transfer by the Judicial Panel on Multidistrict Litigation. Defendants maintain that a stay is appropriate pending a determination by the MDL on whether to transfer the case to the Western District of Washington because it will conserve judicial resources, and it will avoid the risk of inconsistent pre-trial rulings. In opposition to defendants' motion, plaintiff contends that this Court is better suited to rule on the issues of Louisiana law implicated in plaintiff's complaint and in plaintiff's pending motion to remand. Plaintiff also contends that a stay will delay the matter and cause her unnecessary expense

II. DISCUSSION

"The pendency of the transfer order does not in any way defeat or limit the authority of this Court to rule upon matters properly presented to it for decision." *Calvin Boudreaux v. Metropolitan Life Ins. Co.*, 1995 WL 83788, *1 (E.D. La. 1995) (citing *In re Air Crash at Paris, France*, 376 F.Supp. 887 (JPML 1974)). The decision whether to stay proceedings is discretionary, and the exercise of discretion is guided by the policies of justice and efficiency. *Id.*

Judicial economy would be served by a stay pending the transfer if the issues involved in the remand motion are likely to arise in the cases that have been or will be transferred to the Western District of Washington. *In re Ivy*, 901 F.2d 7, 9 (2d Cir 1990). The transferee judge "certainly has the power to determine the question of remand," and if the remand issues are common to many of the PPA cases, decisions by the transferee judge would avoid "duplicative discovery and conflicting pretrial rulings." *Calvin Boudreaux*, 1995 WL 83788 at *2 (quoting *In re Air Crash Disaster at Florida*, 368 F.Supp. 812, 813 (JPML 1973)).

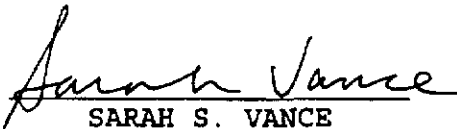
Here, defendants challenge the joinder of the nondiverse defendants, Walgreens and K&B, on a number of grounds. For example, defendants claim that some of plaintiff's Louisiana redhibition claims are time-barred and that even viewing the undisputed facts in the light most favorable to plaintiff, no reasonable basis exists under which plaintiff could prevail against the nondiverse defendants. As Magistrate Judge Kirk noted in a ruling on a motion to stay in a PPA case in the Western District of Louisiana, there are numerous cases in districts throughout Louisiana alleging damages as a result of the ingestion of PPA in which the plaintiffs assert Louisiana redhibition claims against nondiverse retail sellers. See *Bayer's Ex. N, James Bowman v. Bayer Corporation, et al.*, No. 01-

1802-A, at 2. Additionally, a number of cases involving PPA have been consolidated and transferred to the Western District of Washington, including a case out of the Western District of Louisiana, and many other Louisiana cases have been conditionally transferred and await a final ruling. See Bayer's Ex B, *In re Phenylpropanolamine (PPA) Products Liability Litigation*, Transfer Order, MDL No. 1407, August 28, 2001. The Court finds that because the issues involved in this remand are likely to be common to other transferred cases, the policies of efficiency and consistency of pre-trial rulings are furthered by a stay of the proceedings in this Court pending a decision on the transfer of this case to the MDL.

III. Conclusion

For the foregoing reasons, the Court GRANTS defendants' motion for a stay of the proceedings.

New Orleans, Louisiana, this 16th day of May, 2002.


SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 FEB -7 A 11:44
M. PETRA G. WHYTE
CLERK
M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

COLIN BARRILLEAUX, ET AL

v.

AMERICAN HOME PRODUCTS
CORPORATION, ET AL

CIVIL ACTION
NO. 02-CV-0170

SECTION "J"

MAGISTRATE: 2

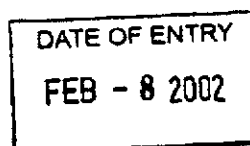
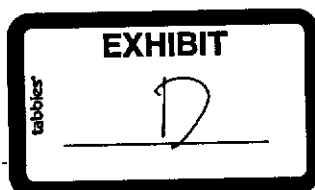
JOINT MOTION TO STAY PROCEEDINGS

MAY IT PLEASE THE COURT

The above matter is one of several hundred actions, which has been requested to be a "tag-along" action pursuant to MDL-1407 - in re Phenylpropanolamine (PPA) Products Liability Litigation.

As plaintiffs' counsel will not file any objections and/or oppose the tag-along procedures, the MDL Panel will designate the above matter as a tag-along action, and stay the above proceedings.

Plaintiffs' and defense counsel seek to stay the above proceedings, pending this decision from the MDL Panel, as it would serve both parties and this Honorable Court to delay any action



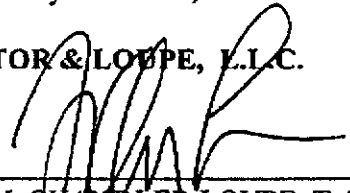
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on the above matter, which will be transferred to another jurisdiction in a matter of days, based upon other actions already transferred. As such, the stay will save Judicial Resources, and the parties' time and expenses in responding to said motions

Respectfully submitted,

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By



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713/759-1217 (Facsimile)

J. ROBERT DAVIS, L.L.P.

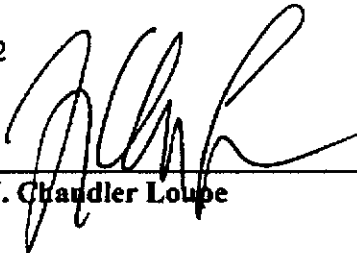
J. ROBERT DAVIS
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713/425-5255 (Telephone)
713/425-5355 (Facsimile)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 6th day of February, 2002



J. Chandler Loupe

Deliberate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

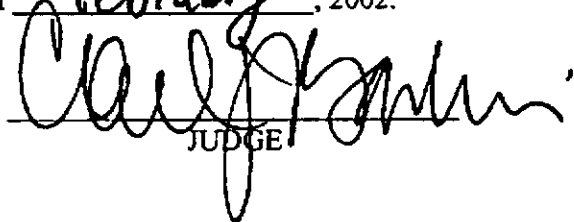
COLIN BARRILLEAUX, ET AL * CIVIL ACTION
 * NO. 02-CV-0170
v. *
 * SECTION "J"
AMERICAN HOME PRODUCTS *
CORPORATION, ET AL * MAGISTRATE: 2
 *

ORDER

Considering the above and foregoing Joint Motion to Stay Proceedings,

IT IS ORDERED that the above proceeding be Stayed pending a decision of the Judicial
Panel on Multidistrict Litigation on whether to Stay and Transfer said action.

New Orleans, Louisiana this 8th day of February, 2002.


JUDGE

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

CHAIRMAN:
Judge Wm. Terrell Hodges
United States District Court
Middle District of Florida

MEMBERS:
Judge John F. Keenan
United States District Court
Southern District of New York

Judge Morey L. Sear
United States District Court
Eastern District of Louisiana

Judge Bruce M. Selya
United States Court of Appeals
First Circuit

Judge Julia Smith Gibbons
United States District Court
Western District of Tennessee

Judge D. Lowell Jensen
United States District Court
Northern District of California

Judge J. Frederick Motz
United States District Court
District of Maryland

DIRECT REPLY TO:

Michael J. Beck
Clerk of the Panel
One Columbus Circle, NE
Thurgood Marshall Federal
Judiciary Building
Room G-255, North Lobby
Washington, D.C. 20002

Telephone: (202) 502-2800
Fax: (202) 502-2888

<http://www.jpml.uscourts.gov>

April 15, 2002

RECEIVED
APR 19 2002

TO INVOLVED COUNSEL

Re: MDL-1407 -- In re Phenylpropanolamine (PPA) Products Liability Litigation

Stephanie L. Horne v. American Home Products, et al., W.D. Kentucky, C.A. No. 3:01-631
Alejandro Garcia, et al. v. SmithKline Beecham Corp., et al., E.D. Louisiana, C.A. No. 2:01-3424
Wendell Phillips v. SmithKline Beecham Corp., et al., E.D. Louisiana, C.A. No. 2:01-3448
Kenneth Peterson, et al. v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3467
Doreen Martin v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3477
Jeanette P. Favorite, et al. v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3478
Paula J. Sumling, et al. v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3480
Quincy Garrison, et al. v. Whitehall-Robins Healthcare, et al., E.D. Louisiana, C.A. No. 2:01-3484
Wallace Craft, Sr., et al. v. Whitehall-Robins Healthcare, et al., E.D. Louisiana, C.A. No. 2:01-3490
Mary Lee, et al. v. Whitehall-Robins Healthcare, et al., E.D. Louisiana, C.A. No. 2:01-3522
Lydia Dyson v. American Home Products Corp., et al., E.D. Louisiana, C.A. No. 2:01-3548
Denny Vick, etc. v. Novartis Corp., et al., S.D. Mississippi, C.A. No. 4:01-329
Catherine Uwagboe v. Whitehall-Robins, et al., S.D. Mississippi, C.A. No. 5:01-339
Freddie L. Alexander v. Bayer Consumer Care, et al., S.D. Mississippi, C.A. No. 5:01-340

Dear Counsel:

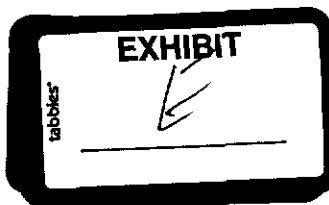
For your information, I am enclosing a copy of an order filed today by the Judicial Panel on Multidistrict Litigation involving this matter.

Very truly,

Michael J. Beck
Clerk of the Panel

By: 
Deputy Clerk

Enclosure



JPML Form 34B

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

APR 15 2002

DOCKET NO. 1407

FILED
CLERK'S OFFICE

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

**IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY
LITIGATION**

Stephanie L. Horne v. American Home Products, et al., W.D. Kentucky, C.A. No. 3:01-631
Alejandro Garcia, et al. v. SmithKline Beecham Corp., et al., E.D. Louisiana, C.A. No. 2:01-3424
Wendell Phillips v. SmithKline Beecham Corp., et al., E.D. Louisiana, C.A. No. 2:01-3448
Kenneth Peterson, et al. v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3467
Doreen Martin v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3477
Jeanette P. Favorite, et al. v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3478
Paula J. Sumling, et al. v. Bayer Corp., et al., E.D. Louisiana, C.A. No. 2:01-3480
Quincy Garrison, et al. v. Whitehall-Robins Healthcare, et al., E.D. Louisiana, C.A. No. 2:01-3484
Wallace Craft, Sr., et al. v. Whitehall-Robins Healthcare, et al., E.D. Louisiana, C.A. No. 2:01-3490
Mary Lee, et al. v. Whitehall-Robins Healthcare, et al., E.D. Louisiana, C.A. No. 2:01-3522
Lydia Dyson v. American Home Products Corp., et al., E.D. Louisiana, C.A. No. 2:01-3548
Denny Vick, etc. v. Novartis Corp., et al., S.D. Mississippi, C.A. No. 4:01-329
Catherine Uwagboe v. Whitehall-Robins, et al., S.D. Mississippi, C.A. No. 5:01-339
Freddie L. Alexander v. Bayer Consumer Care, et al., S.D. Mississippi, C.A. No. 5:01-340

**BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN,
MOREY L. SEAR, BRUCE M. SELYA,* JULIA SMITH GIBBONS, D.
LOWELL JENSEN AND J. FREDERICK MOTZ, JUDGES OF THE PANEL**

TRANSFER ORDER

Before the Panel are motions brought, pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), by plaintiffs in fourteen Western District of Kentucky, Eastern District of Louisiana or Southern District of Mississippi actions. These parties move the Panel to vacate its orders conditionally transferring their actions to the Western District of Washington for inclusion in the centralized pretrial proceedings occurring there in this docket before Judge Barbara Jacobs Rothstein. Various defendants in the actions support transfer.

On the basis of the papers filed and hearing session held, the Panel finds that these actions involve common questions of fact with actions in this litigation previously transferred to the Western District of Washington, and that transfer of the actions to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring there will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The Panel is persuaded that transfer of the actions is appropriate for reasons expressed by the Panel in its original order directing

*Judge Selya took no part in the decision of this matter.

- 2 -

centralization in this docket. The Panel held that the Western District of Washington was the proper Section 1407 forum for actions brought by persons allegedly injured by products containing Phenylpropanolamine – a substance which, until it recently became the subject of a public health advisory issued by the Food and Drug Administration, was used as an ingredient in many nasal decongestants and weight control products. See *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 173 F.Supp.2d 1377 (J.P.M.L. 2001).

Plaintiffs premise much of their opposition to transfer on their argument that federal jurisdiction is lacking in their actions. These parties urge the Panel not to order transfer before their motions are resolved by the transferor court. We note, however, that remand and other motions, if not resolved in the transferor court by the time of Section 1407 transfer, can be presented to and decided by the transferee judge. See, e.g., *In re Ivy*, 901 F.2d 7 (2nd Cir. 1990); *In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, these fourteen actions are transferred to the Western District of Washington and, with the consent of that court, assigned to the Honorable Barbara Jacobs Rothstein for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

FOR THE PANEL:



Wm. Terrell Hodges
Chairman

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

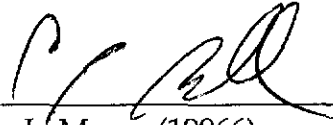
BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
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NOTICE OF HEARING

PLEASE TAKE NOTICE that Bayer Corporation, will bring on for hearing on October 16, 2002, at 9 30 a m before Judge Kurt D Engelhardt at the United States District Courthouse for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana 70130, the accompanying Motion for Temporary Stay of Proceedings Pending a Final Ruling of the Judicial Panel on Multidistrict Litigation on Transfer of This Case to MDL-1407

Respectfully submitted,



Mary L. Meyer (19966)

John F. Olinde (1515)

Charles P. Blanchard (18798)

CHAFFE, MCCALL, PHILLIPS,

TOLER & SARPY, L.L.P.

2300 Energy Centre, 1100 Poydras Street

New Orleans, LA 70163-2300

Telephone (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid, this 23rd day of September, 2002





CASE. 2-02-cv-02436/P
DOCUMENT: 26
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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

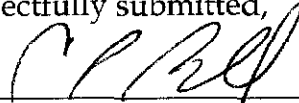
* CIVIL ACTION
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* NO 02-2436
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* SECTION N
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* MAGISTRATE 5
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**BAYER CORPORATION'S MOTION FOR EXPEDITED HEARING
ON MOTION FOR TEMPORARY STAY OF PROCEEDINGS
PENDING A FINAL RULING OF THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION ON TRANSFER OF THIS CASE TO MDL-1407**

Bayer Corporation hereby moves for an expedited hearing on its Motion for Temporary Stay of Proceedings Pending Final Ruling of the Judicial Panel on Multidistrict Litigation on Transfer of this Case to MDL-1407 Bayer Corporation's reasons supporting this request are contained in the attached memorandum in support

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Respectfully submitted,



Mary L. Meyer (19966)

John F. Olinde (1515)

Charles P. Blanchard (18798)

CHAFFE, MCCALL, PHILLIPS,

TOLER & SARP, L.L.P.

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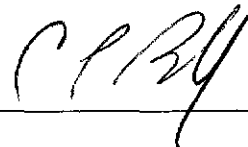
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Telephone (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by hand or by depositing same in the United States Mail, postage prepaid, this 23rd day of SEPTEMBER, 2002.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | | |
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| DAPHINE B DONNELLY, and | * | CIVIL ACTION |
| JEROME DONNELLY, Husband | * | |
| | * | NO 02-2436 |
| VERSUS | * | |
| | * | SECTION N |
| BAYER CORPORATION, NOVARTIS | * | |
| PHARMACEUTICALS CORPORATION, | * | MAGISTRATE 5 |
| NOVARTIS CONSUMER HEALTH, INC , | * | |
| 4LIFE RESEARCH, LC, Successor by | * | |
| merger to SHAPERITE, SMOOTHIE KING | * | |
| CO , INC , SMOOTHIE KING SYSTEMS, | * | |
| INC , and WALGREEN LOUISIANA CO , | * | |
| INC (D/B/A "WALGREENS") | * | |
| ***** | | |

**BAYER CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION
FOR EXPEDITED HEARING ON MOTION FOR TEMPORARY STAY OF
PROCEEDINGS PENDING A FINAL RULING OF THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION ON TRANSFER OF THIS CASE TO MDL-1407**

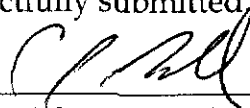
On September 9, 2002, plaintiffs filed their Motion to Remand in this case. Plaintiffs' motion to remand is set for hearing on October 2, 2002. This Court should not decide plaintiff's motion until after the Judicial Panel on Multidistrict Litigation determines whether this case will be transferred to the Western District of Washington as part of MDL-1407.

As explained in Bayer Corporation's ("Bayer") Memorandum in Support of Motion for Temporary Stay, this Court and courts encompassing several divisions of the Eastern District of Louisiana have issued stay orders in PPA cases pending a decision on transfer to the MDL proceeding. See Bayer's Memorandum in Support of Motion for Temporary Stay.

A stay of plaintiff's remand motion and all other proceedings in this case pending the Panel's decision on transfer would further the goals of judicial efficiency and consistency by avoiding duplicative proceedings and conflicting pre-trial rulings. If the Panel orders transfer, the MDL Court may decide the remand motion in this case and numerous other similar cases in a consistent manner. If the Panel denies transfer, this Court can then decide the motion to remand. Accordingly, the Court should stay this case, including plaintiff's motion to remand, pending a final order from the Panel on transfer.

For the foregoing reasons, as well as those contained in Bayer's Memorandum in Support of its Motion for Temporary Stay filed this date, Bayer requests that this Court set Bayer's Motion for Temporary Stay of Proceedings Pending Final Ruling of the Judicial Panel on Multidistrict Litigation on Transfer of this Case to MDL-1407 for hearing on or before October 2, 2002 so that it may be considered before plaintiff's Motion to Remand.

Respectfully submitted,



Mary L. Meyer, Esq (19966)

John F. Olinde (1515)

Charles P. Blanchard (18798)

CHAFFE, MCCALL, PHILLIPS,

TOLER & SARP, L.L.P.

2300 Energy Centre, 1100 Poydras Street

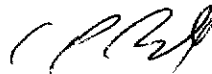
New Orleans, LA 70163-2300

Telephone (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by hand or by depositing same in the United States Mail, postage prepaid, this 12th day of September, 2002



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/ A "WALGREENS")

* CIVIL ACTION
*
* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
*
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ORDER

Considering Bayer Corporation's Motion for Expedited Hearing on Motion for
Temporary Stay of Proceedings Pending Final Ruling of the Judicial Panel on Multidistrict
Litigation on Transfer of this Case to MDL-1407

IT IS ORDERED that Bayer Corporation's Motion for Temporary Stay of
Proceedings Pending Final Ruling of the Judicial Panel on Multidistrict Litigation on
Transfer of this Case to MDL-1407 is set for hearing on the ____ day of _____,
2002 at _____

New Orleans, Louisiana this _____ day of _____, 2002

UNITED STATES DISTRICT JUDGE



CASE 2 02-cv-02436/P
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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| DAAPHINE DONNELLY, ET AL | * | CIVIL ACTION |
| | * | |
| VERSUS | * | NO 02-CV-02436 |
| | * | |
| BAYER CORPORATION, ET AL | * | JUDGE ENGELHARDT |
| | * | |
| * * * * * | | MAGISTRATE JUDGE SHUSHAN |

**RESPONSE IN OPPOSITION TO BAYER CORPORATION'S
MOTION FOR TEMPORARY STAY**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Daphine Donnelly and Jerome Donnelly (hereinafter referred to as "Plaintiffs"), who respectfully submit this Response in Opposition to Bayer Corporation's Motion For Temporary Stay of Proceedings

1 Background

Plaintiffs filed this suit in the 34th Judicial District Court against Bayer Corporation, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc , 4Life Research, Successor by merger to Shaperite, Smoothie King Co , Inc , Smoothie King Systems, Inc , and Walgreen Louisiana Co , Inc , d/b/a "Walgreens" for marketing, selling, distributing, and/or manufacturing Shaperite, Alka Seltzer Plus and Tavist-D, all PPA-containing products

Defendants, Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc filed a Notice of Removal on August 7th, 2002, and subsequently a Motion to Dismiss for Failure to State a Claim Upon which Relief Can Be Granted on September 6, 2002 Thereafter, Plaintiffs filed a Motion

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to Remand, Response in Opposition to Defendants' Motions to Dismiss for Failure to State a Claim Upon which Relief Can Be Granted and now file this Response in Opposition to Defendant's Motion to Temporary Stay. Plaintiffs respectfully request that this Court rule on Plaintiff's Motion to Remand and Response to Defendant Novartis Pharmaceuticals Corporation's and Novartis Consumer Health, Inc.'s Motions for Dismissal, thus, denying Defendant Bayer Corporation's Motion to Temporary Stay.

2 Argument

The case subject to this Response in Opposition to Defendant's Motion was improvidently removed to Federal Court by the manufacturer defendants of products which contained Phenylpropanolamine (hereinafter "PPA"). Plaintiffs responded by filing a Motion to Remand and seek to have the Court rule on this Motion before the case is transferred to the Judicial Panel on Multidistrict Litigation (hereinafter "MDL Panel"). Because the Louisiana Federal Courts lack jurisdiction over the matter, it would be a waste of judicial resources and economy for the MDL Panel to allow the Western District of Washington to preside over the case that belongs in state court. Moreover, Louisiana Federal Courts are well-versed in matters pertaining to Louisiana law and therefore is the forum of choice to decide the issue of remand. As such, Defendant's Motion to Temporary Stay should be denied and this court should rule on Plaintiff's Motion to Remand.

This issue is not a novel theory, although not binding to this Court, Judge Lemelle, sitting in the Eastern District of Louisiana, has previously denied such a Motion. In that case, even when a Conditional Transfer Order to the MDL Panel had been filed, Judge Lemelle denied the Motion to Stay, citing Rule 1.5 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, finding that the District Court of Louisiana retained jurisdiction to hear all such matters before the case is officially transferred to the MDL Panel pursuant to the rule. (See Andry, et al v American

Home Products Corporation, et al., No 02-0173 (Lemelle, J., E.D. La February 8, 2002) (Exhibit A hereto) Although a Conditional Transfer Order has been filed in this matter, Plaintiffs have opposed such transfer. This Court however retains the authority and jurisdiction to deny the Motion to Stay and rule on other matters currently pending before the Court.

3 Conclusion

For the foregoing reasons, Plaintiffs pray that Bayer Corporation's Motion to Temporary Stay be denied.

Respectfully submitted,

By *Chandler Loupe/gmw*

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 24th day of Sept, 2002

Chandler Loupe/gmu
J. Chandler Loupe

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KATHLEEN ANDRY, ET AL * CIVIL ACTION
* NO. 02-CV-0173
*
* SECTION "B"
AMERICAN HOME PRODUCTS *
CORPORATION, ET AL * MAGISTRATE
*

JOINT MOTION TO STAY PROCEEDINGS

MAY IT PLEASE THE COURT

The above matter is one of several hundred actions, which has been requested to be a "tag-along" action pursuant to MDL-1407 - in re Phenylpropanolamine (PPA) Products Liability Litigation

As plaintiffs' counsel will not file any objections and/or oppose the tag-along procedures, the MDL Panel will designate the above matter as a tag-along action, and stay the above proceedings.

'Plaintiffs' and defense counsel seek to stay the above proceedings, pending this decision from the MDL Panel, as it would serve both parties and this Honorable Court to delay any action

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on the above matter, which will be transferred to another jurisdiction in a matter of days, based upon other actions already transferred. As such, the stay will save Judicial Resources, and the parties' time and expenses in responding to said motions.

Respectfully submitted,

CLAITOR LOUPE, L.L.C.

By: 

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713/759-1217 (Facsimile)

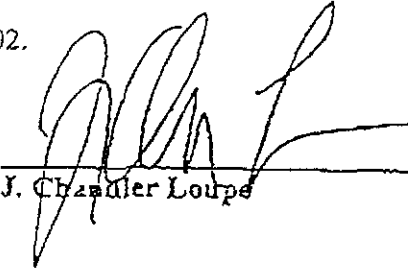
J. ROBERT DAVIS, L.L.P.
J. ROBERT DAVIS
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Houston, TX 77002
713/425-5255 (Telephone)
713/425-5355 (Facsimile)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 6th day of February, 2002.



J. Chandler Loupe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KATHLEEN ANDRY, ET AL + CIVIL ACTION
NO. 02-CV-0173

v. +

AMERICAN HOME PRODUCTS + SECTION "B"
CORPORATION, ET AL + MAGISTRATE

ORDER

ORDER

Considering the above and foregoing Joint Motion to Stay Proceedings,
IT IS ORDERED that the above proceedings be Stayed pending a decision of the Judicial Panel on Multidistrict Litigation on whether to Stay and Transfer said action

New Orleans, Louisiana this _____ day of _____, 2002

JUDGE



CASE: 2:02-cv-02436/P
DOCUMENT: 24
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EASTERN DISTRICT OF LA.

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LORELLA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO.,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-2436
*
* SECTION N
*
* MAGISTRATE 5
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**OPPOSITION OF BAYER CORPORATION,
NOVARTIS PHARMACEUTICALS CORPORATION, AND
NOVARTIS CONSUMER HEALTH, INC. TO
PLAINTIFFS' MOTION TO REMAND**

As Bayer Corporation ("Bayer"), Novartis Pharmaceuticals Corporation, and Novartis Consumer Health, Inc explain in their motion to temporarily stay these proceedings pending transfer of this suit to the MDL-1407 proceeding in the Western District of Washington consolidating numerous cases concerning Phenylpropanolamine ("PPA"), this Court should not address the merits of plaintiffs' remand motion. But even if this Court declined to issue a stay, it should deny remand and retain jurisdiction under

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28 U.S.C. § 1332 The sole question here is whether Walgreen Louisiana Co., Inc. ("Walgreen"), Smoothie King Co., Inc., and Smoothie King Systems, Inc. (collectively "Smoothie King"), the only non-diverse defendants, were fraudulently joined. The record and the law establish fraudulent joinder in this case

BACKGROUND

Plaintiffs, Daphne and Jerome Donnelly, filed this suit in Louisiana state court to recover personal-injury and loss-of-consortium damages allegedly resulting from Mrs. Donnelly's use of cold and appetite-suppressant medications allegedly containing PPA. Bayer, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc., and 4Life Research, LC ("4Life") are alleged to be the manufacturers of the medications. See Petition, ¶ 2. Additional defendants are Walgreen and Smoothie King, the "retailer/seller defendants," who allegedly advertised and sold the medications. See Petition, ¶¶ 3 and 9. Bayer removed the action to federal court based on diversity jurisdiction. Plaintiff is a Louisiana citizen. Bayer, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc., and 4Life are companies that are incorporated and have their principal places of business in states other than Louisiana. Walgreen and Smoothie King, though citizens of Louisiana, are fraudulently joined. And the matter in controversy exceeds \$75,000. See Notice of Removal.

Mrs. Donnelly allegedly purchased medications containing PPA at Walgreen's "pharmaceutical/retail store" and Smoothie King's "nutritional/retail store" in Chalmette, Louisiana, before ingesting them and suffering a stroke on January 12, 1991. See Petition, ¶ 9. Plaintiffs purport to assert claims against Walgreen and Smoothie King

under La Civ. Code arts 2520, *et seq.* for breach of the warranty against redhibitory defects by allegedly failing to notify plaintiffs of the side-effects of the medications despite actual knowledge, under La Civ Code art 2524 for alleged failure to sell a product fit for its ordinary usage, under la Civ Code art 2529 for allegedly delivering products not of the kind or quality specified by the seller, and claims in negligence, "want of care," gross negligence, strict liability, and intentional and willful "conspiracy" with the manufacturers in allegedly concealing the hazardous nature of the over-the-counter medications sold See Petition, ¶ 17, *et seq.*; Memorandum in Support of Motion to Remand, pp 2-3 But plaintiffs cannot prevail on these claims against Walgreen and Smoothie King under Louisiana law.

Significantly, plaintiffs allege that "Pharmaceutical manufacturer defendants failed to alert users, potential users, and retail dealers who would be expected to sell and/or recommend its products, of the hazards associated with said products' usage, and further actively promoted and advertised their products in a manner that suggested the design of their products was safe " (Petition, ¶ 15) (emphasis added) In light of that allegation, plaintiffs refute their own allegations that the retailer/seller defendants had "actual knowledge" of redhibitory defects, "knew or should have known" of the alleged risk of harm, and intentionally and willfully conspired with the manufacturers to conceal material facts concerning the alleged hazards in the medications

The affidavit of Steve Kuhnau, Chairman of the Board of Directors of Smoothie King, further establishes that Smoothie King first operated a store in Chalmette, Louisiana on February 17, 1992 and operated no other store in that location in the history of its

franchising business. See **Exhibit A** attached, ¶ 2-4. Plaintiffs allege that Daphne Donnelly suffered a stroke over a month earlier, on January 12, 1991. See Petition, ¶ 10. Under these circumstances, it was impossible that she purchased PPA medication at a Smoothie King "nutritional/retail store located in the City of Chalmette, State of Louisiana" as alleged in the petition.

Walgreen's responses to Novartis Consumer Health, Inc.'s and Bayer's Requests for Admission (**Exhibits B and C** attached) establish that Walgreen did not design, manufacture, test, process, label, package, distribute, sell, market, warrant, promote, represent, or advertise the medications as its own products, did not hold itself out as manufacturer of the medication, and did not exercise or attempt to exercise any control or influence over any characteristic of the design, composition, warnings, warranties, or quality of the medications, which it purchased and sold in unaltered, sealed packages that the manufacturers had labeled and packaged (Response Nos. 2-6). At the time of the alleged sale, Walgreen did not know of or omit to declare any alleged defect in the medications that it sold (Response No. 7). Walgreen neither made nor implied any warranties concerning the testing, safety, effectiveness, or ingredients of the medicines (Response No. 8). At no time before filing suit did plaintiffs give Walgreen notice of any alleged redhibitory defect in the medications allegedly purchased or tendered them to Walgreen for a rescission of the sale and return of the purchase price and expenses of sale (Response No. 10).

LAW AND ARGUMENT

This Court determines removal jurisdiction on the basis of the claims stated in the state-court petition at the time of removal. *Cavallini v. State Farm Mut. Auto. Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). Conclusory allegations or legal conclusions put forward as factual findings do not establish a cause of action against a non-diverse defendant. *Strickland v. Brown Morris Pharmacy, Inc.*, 1996 WL 537736, *2 (E.D.La. Sept. 20, 1996). “[A] removing party’s claim of fraudulent joinder to destroy diversity is viewed similar to a motion for summary judgment.” *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992). The court can determine “[b]y summary judgment or otherwise” whether joinder is fraudulent. *Keating v. Shell Chemical Co.*, 610 F.2d 328, 333 (5th Cir. 1980). “[F]raudulent joinder claims can be resolved by ‘piercing the pleadings’ and considering summary judgment-type evidence . . .” *Cavallini v. State Farm Mut. Auto. Ins. Co.*, 44 F.3d at 263. A plaintiff cannot simply rely on conclusory allegations of the petition in the face of the removing defendant’s summary-judgment type evidence showing no reasonable possibility of recovery against the named non-diverse defendant under state law. See *Carniere v. Sears, Roebuck and Co.*, 893 F.2d at 100-102 (even though the petition alleged that the resident co-employee defendants were “substantially certain” that harmful consequences would result from their conduct, the non-diverse defendants’ affidavits and depositions demonstrated no possibility of recovery against them on an intentional tort theory under Louisiana law).

I. Plaintiffs Have Fraudulently Joined Smoothie King

As explained above, the unrefuted affidavit of Smoothie King’s chairman establishes that it did not operate any “nutritional/retail store” in Chalmette, Louisiana

when Mrs. Donnelly allegedly purchased "Shapefast® and suffered a stroke." Thus, plaintiffs have no possibility of recovery against Smoothie King, and it is fraudulently joined

In support of their motion to remand, plaintiffs have no countervailing evidence to dispute Smoothie King's affidavit. Instead, they assert at page 10 of their memorandum "that further discovery is necessary regarding this issue " But a plaintiff cannot support remand by arguing that future discovery may reveal the culpability of the non-diverse defendant, instead, the court looks to the allegations contained in the petition. *Strickland v Brown Morris Pharmacy Inc* , cited above. A transparent attempt to manufacture a factual dispute, or to raise the specter of potential liability arising out of facts that might come forth in discovery, does not deprive the court of its jurisdiction. *See Poulos v. Naas Foods, Inc* , 959 F 2d 69, 74 (7th Cir 1992) ("Although [the removing defendant] bears a heavy burden to establish fraudulent joinder, it need not negate any possible theory that [the plaintiff] might allege in the future; only [the] present allegations count If [the plaintiff's] theory were right, he could defeat diversity jurisdiction by joining his grandmother as a defendant--surely some set of facts might make her liable ") (Emphasis in original)

II. Plaintiffs Have Fraudulently Joined Walgreen

A. Plaintiffs have no viable cause of action under Louisiana law against a retail pharmacy

Because Louisiana law limits a pharmacist's liability to filling prescriptions and warning of overdoses, the pharmacy had no duty to warn the plaintiff about possible side

effects [associated with a drug], and there can be no claim against it in either tort or redhibition.” See *Williams v Warner-Lambert Co*, No. 01-0690 (W.D La. July 27, 2001) (Exhibit D attached) Louisiana law is consistent with the uniform national rule that a pharmacist has no duty to warn its customers about potential hazards or side-effects of prescription drugs. See *Jones v Irvin*, 602 F Supp 399, 400-01 (S D Ill 1985) (“A pharmacist has no duty to warn” about alleged side-effects associated with a prescription drug, and “[t]here is no conflict of authority as to the duty required of a druggist in his dealing with his customers”). See also *In re Rezulin Products Liability Litigation*, 133 F Supp 2d 272, 289 and n. 55 (S.D N Y 2001) (exhaustively surveying the jurisprudence, citing cases from several states, and concluding that plaintiffs had no reasonable possibility of recovery against the pharmacist under Louisiana law).

To date, in 26 PPA cases removed from Louisiana state courts, including *Perksin v Bayer Corporation*, No. C01-2023R (W D Wash Feb. 26, 2002), Judge Rothstein, the presiding judge in MDL-1407, has denied motions to remand, upon finding fraudulent joinder of the non-diverse drug stores who had allegedly sold the over-the-counter medications See Exhibit E See also list of cases in Bayer’s Memorandum in Support of Motion for Temporary Stay Rejecting the plaintiff’s arguments that he had viable causes of action in redhibition and negligence, the *Perksin* court correctly recognized that he had provided no factual support for his conclusory allegations that the defendant retail pharmacy, K&B/Rite Aid, had known of potential dangers in the medication *Id* at 5-6 K&B/Rite Aid’s responses to requests for admissions had pierced the pleadings with evidence that it had no control over the pre-packaged, sealed medications and had no

knowledge of any potential dangers *Id* at 6 and 10. The *Perksin* court further observed that remand of the case would prove “inequitable” because “[s]uch a tenuous cause of action based on de minimis recovery should not defeat federal jurisdiction.” *Id* at 6-7.

Importantly, citing Louisiana decisions, *supra*, the *Perksin* court recognized that pharmacists have no duties to warn of potential side-effects from prescription drugs or to inspect the medication under Louisiana law. *Id* at 7-8. Whether sounding in tort or contract, plaintiff’s alleged causes of action against the retail pharmacy had no reasonable probability of success in a PPA case, even though it involved an over-the-counter medication:

The limitation on liability for pharmacies logically extends to over-the-counter medications, for which pharmacies have even less direct responsibility. For example, the court in *Strickland v. Brown Morris Pharmacy, Inc.*, 1996 WL 537736 (E D La 1996), denied remand in a suit against a pharmacy for the sale of Primatine Mist, a non-prescription medication. The court cited La. Civ. Code art. 2545, the redhibition statute regarding bad faith sellers, and held that the plaintiff had no cause of action against a pharmacy that sold the product in good faith. *See also Sharkey v. Sterling Drug, Inc.*, 600 So.2d 701, 715 (La. Ct. App. 1992) (upholding dismissal of redhibition claim against good faith pharmacists who sold nonprescription aspirin), *see also In Re Diet Drugs*, 1998 WL 254976 (E D Pa. 1998) (denying remand motion and finding fraudulent joinder of Louisiana pharmacies accused of breach of warranty for good faith sales of nonprescription diet drugs). Just as in these cases, Walgreen and K&B had no knowledge of potential dangers in the nonprescription medications it sold, and plaintiff cannot pursue a cause of action against the pharmacy.

Plaintiff argues that the over-the-counter cases sounded in tort or alleged knowledge by the pharmacist. However, as explained above, Louisiana courts have applied the limitation of liability to contract claims in the prescription drug context. The reasoning applies with even greater force for

nonprescription medications sold by innocent pharmacists, because the pharmacist does not even have a duty to measure a nonprescription drug or warn of possible overdose. As a result, plaintiff's cause of action against K&B has no reasonable probability of success whether couched as tort or redhibition.

Id. at 8-9. Even if K&B/Rite Aid were not a pharmacist, the *Perksin* court further concluded that the plaintiff's complaint still would fail because any non-manufacturer or seller of a product is liable in tort only if he knew or should have known that the product sold was defective and failed to declare it. *Id.* at 9-10. The *Perksin* court recognized that K&B/Rite Aid's responses to requests for admission "refute the plaintiff's broad, unsupported assertions that K&B knew of dangers" and that "plaintiff has not alleged facts supporting its allegation that K&B knew or should have known of the dangers." *Id.* at 10. "[A] plaintiff cannot defeat federal jurisdiction by relying solely on conclusory allegations." *Id.* at 5-6.

Furthermore, plaintiffs have no viable claim against Walgreen for allegedly failing to alert Mrs. Donnelly of the alleged hazard in the prepackaged and FDA-approved medications it allegedly sold. Federal law and FDA regulations specify the required labeling and preempt a failure-to-warn claim under state law against the manufacturer of an FDA-approved over-the-counter cold medication. *See Green v. BDI Pharmaceuticals*, 803 So.2d 68, 74-75 (La. App. 2d Cir. 2001). A responsible retailer selling an FDA-regulated medication in a sealed package with an approved label is certainly not required to second-guess the federal agency that regulates the product. Plaintiffs have not alleged and cannot allege that Walgreen sold anything other than medications that the FDA had

approved at the time. Thus, no legal or factual basis exists for their conclusory allegations that Walgreen knew or should have known of the alleged hazard and is liable under Louisiana law for allegedly failing to warn of it.

Plaintiff cites *Mosley v. Bayer Corporation, et al*, No. 01-3479 (E.D. La. Jan. 29, 2002), a PPA case where the court granted a motion to remand. But, the *Mosley* court concluded that plaintiff's cause of action in redhibition had not necessarily prescribed if the claim were against a bad-faith seller. The court further noted that plaintiff's claims would have prescribed if the defendant were a good-faith seller. The *Mosley* decision, however, did not address the insufficiency of the plaintiff's conclusory allegations that the named retail pharmacy knew or should have known of the alleged defects when the medication was sold. It likewise did not discuss the prerequisites for a "good-faith" redhibition claim or the effect of summary-judgment evidence that pierces the conclusory allegations of the petition.

Judge Lemmon's decision granting remand in *St. Amant v. Bayer Corporation*, No. 01-3421 (E.D. La. Mar. 5, 2002), likewise does not compel a remand in this case. Citing *Strickland*, Judge Lemmon recognized that the conclusory statement in the petition that the retail pharmacy "knew or should have known" of the alleged defect was insufficient to support a "bad-faith" redhibition claim against the retail pharmacy, because the plaintiff had not alleged any facts demonstrating that the defendant seller actually knew of the defect. Here, plaintiff has alleged no claim against Walgreen as a "good-faith" seller, but rather makes similar conclusory allegations in an attempt to assert causes of action in tort and redhibition that require plaintiff to prove that the retail/seller knew or

should have known of the alleged defect. Moreover, like *Mosley*, the *St. Amant* decision does not address the requirements for a “good-faith” redhibition claim or the effect of summary-judgment evidence that pierces the conclusory allegations of the petition. Plaintiff has no possibility of recovery against Walgreen in this case because plaintiff herself alleges that the manufacturing defendants failed to alert the retail dealers about the alleged hazards and because Walgreen has pierced the pleadings with admissions that it had no knowledge of the alleged defect in the prepackaged medications.

In *Coleman v. Bayer Corporation, et al*, No. 02-333 (E.D. La. Apr. 2, 2002), cited by plaintiffs, Judge Barbier remanded a PPA case upon concluding that the petition stated a claim against Walgreen as a “bad faith” seller. The *Coleman* court noted the plaintiff’s allegations and arguments that all of the defendants, including Walgreen, knew or should have known of the allegedly dangerous side-effects of consuming products with PPA. But the *Coleman* court erroneously relied on conclusory allegations that plaintiff’s own petition had refuted by alleging that the manufacturer defendants failed to alert the retail dealers about the alleged hazards. The *Coleman* court likewise did not address Walgreen’s responses to requests for admission that pierced plaintiffs’ conclusory allegations of its knowledge. The *Coleman* decision thereby reaches a result contrary to *Strickland*, cited above, as well as *Perksin*, **Exhibit E** attached.

Equally misplaced is plaintiffs’ reliance on *Garner v. Louisiana Housing*, 798 So 2d 295 (La. App. 4 Cir. 2001), *Hopper v. Crown*, 560 So 2d 890 (La. App. 1 Cir. 1990); and *Ross v. John’s Bargain Stores Corp.*, 464 F 2d 111 (5th Cir. 1972), cited at pages 8-11 of their memorandum in support of the motion to remand. *Garner* affirmed rescission of a sale of

a defective motor home where the seller offered no competent evidence to rebut a presumption that he had knowledge of the defects. *Hopper* reversed a summary judgment in favor of a seller of a steel roll-up door, where the seller had failed to properly submit an affidavit to carry his burden of proving that there was no issue of fact as to whether he actually knew that the door would creep down or that the defect was non-apparent. In *Ross*, the Fifth Circuit likewise reversed a summary judgment in favor of a retailer of a flammable nightgown where widespread publicity had been given to the serious problem of flammable nightwear. Unlike the instant case, none of the cited decisions involved the fraudulent joinder of a retail pharmacy selling FDA-regulated medications in sealed packages or the conclusory allegations of a petition pierced by summary-judgment evidence.

Plaintiff argues that “the burden of proving fraudulent joinder is a heavy one,” citing *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997) and *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 550 (5th Cir. 1981). Importantly, the *B., Inc.* case focuses “on the facts alleged by the plaintiff.” Moreover, the removing defendant can pierce conclusory allegations in the petition through summary-judgment type evidence. *Cavallini v. State Farm Mut. Auto. Ins. Co.*, 44 F.3d at 264. Furthermore, the Fifth Circuit has expressly rejected the contention “that any mere theoretical possibility of recovery under local law—no matter how remote or fanciful—suffices to preclude removal.” *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286, n. 4 (5th Cir. 2000). The Fifth Circuit requires “a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder.” *Id.* (emphasis in original). No reasonable basis exists for recovery

against Walgreen in this case based on the conclusory allegations of the petition that Walgreen's responses pierce and refute.

B. Plaintiff has no viable redhibition and breach-of-implied-warranty claims against Walgreen under Louisiana law

Plaintiffs argue that the retailer/seller defendants "knew or had reason to know" of the alleged "adverse effects of the PPA containing products" they sold and that they are liable for alleged breach of the warranty against redhibitory defects, failure to deliver a product of the kind specified by the seller, and failure to sell a product fit for its ordinary usage. But plaintiffs have neither alleged the necessary elements of such claims nor sought the type of damages recoverable against them. Furthermore, Walgreen's responses to Bayer's requests for admission pierce the conclusory allegations of the petition.

1. Plaintiffs' redhibition/breach-of-implied warranty claims against Walgreen are time-barred

Plaintiff, Daphine Donnelly, allegedly suffered a stroke "[o]n January 12, 1991," after allegedly ingesting PPA-containing medications purchased from Walgreen (Petition, ¶ 10). Although plaintiffs do not specify the dates of purchase before then, they did not file this suit until July 2, 2002--more than four years after Mrs. Donnelly allegedly ingested and sustaining her injuries. Her alleged claims in redhibition/breach of warranty against Walgreen are time-barred.

Under former La. Civ. Code art. 2534, an action in redhibition against a seller without knowledge of a defect "must be instituted within a year, at the farthest, commencing from the date of the sale." Under former La. Civ. Code art. 2546, an action

against a seller who knew of the vice and neglected to declare it to the purchaser had to be filed within a year of the discovery of the vice. Effective January 1, 1995, Article 2534 was amended to provide for a four-year prescriptive period for a claim against a good-faith seller.

A. (1) The action for redhibition against a seller who did not know of the existence of a defect in the thing sold prescribes in four years from the day delivery of such thing was made to the buyer or one year from the date the defect was discovered by the buyer, whichever occurs first [Emphasis added].

DM&M v. Modern Auto Wreckers, Inc., 731 So 2d 1007, 1009 (La App 4th Cir 1999). Under present La. Civ. Code art. 2534(B), an action against a seller who knew of the defect in the thing sold prescribes in one year from the date the buyer discovers the defect. Thus, the discovery rule of *contra non valentem* suspends the running of the one-year prescriptive period against a good-faith seller for up to four years from the date the product was sold. But if four years should pass before the buyer discovers the defect, the plaintiffs' claim against the good faith seller is time-barred, regardless of the plaintiffs' knowledge or lack thereof. Under either former or amended Article 2534, plaintiffs' claims against Walgreen are untimely.

Plaintiffs have no basis for recovery against Walgreen on grounds that it is a bad-faith seller who knew of the alleged defect in the thing sold. Plaintiffs negate their own conclusory allegations, and Walgreen pierces the pleadings by admitting that it did not manufacture the medications, that it exercised no control over their design, composition, warnings, warranties, or quality, that it did not know of or omit to declare any alleged characteristics in the prepackaged and sealed medications that it sold, and that it made no

warranties concerning the testing, safety, effectiveness, or ingredients of the medications (Response Nos 2-9) No presumption exists that this non-manufacturer had such knowledge See *McGough v Oakwood Mobile Homes, Inc.*, 779 So.2d 793, 802 (La App 2d Cir 2000) Because Walgreen is a good-faith seller, all alleged redhibition/breach of warranty claims against it are time-barred under La. Civ. Code art 2534, as plaintiffs filed them more than four years after the alleged sales

2. Plaintiffs cannot claim personal-injury and compensatory damages against Walgreen in redhibition/breach of warranty

Redhibition is unavailable in Louisiana as a theory of recovery for personal-injury damages, redhibition is limited to recovery of pecuniary or "economic" loss *Gremier v Medical Engineering Corp.*, 243 F 3d 200, 206, n 5 (5th Cir 2001), *Jefferson v Lead Industries Ass'n, Inc* , 106 F 3d 1245, 1251 (5th Cir 1997); *Pipitone v Biomatrix, Inc* , 2001 WL 568611, **7-8 (E D La May 22, 2001) La Civ Code arts 2524 (fitness for ordinary use) and 2529 (thing not of a kind specified) contemplate that the buyer's rights and remedies are governed by the rules of sale and conventional obligations. Under La Civ Code arts 1995 and 1998, the damages for alleged breach of a conventional obligation are economic, not non-pecuniary damages. Plaintiffs therefore have no viable claim in redhibition or breach of implied warranty as a theory of recovery against Walgreen for compensatory personal-injury damages

Plaintiffs alleges that she "has suffered and still suffers serious and grievous injuries as a result of ingesting PPA/ephedrine containing products " (Petition, ¶ 10) Her alleged injuries include "paralysis to the right side of her body " *Id* Plaintiffs assert

that Mrs Donnelly has "sustained physical and mental pain and suffering, loss of income, loss of consortium, loss of enjoyment of life, and other damages to be shown at trial" (Petition, ¶ 12) Mr Donnelly alleges loss of consortium "as a result of his spouse's debilitating and impaired condition" (Petition, ¶ 13). Although plaintiffs allege a claim for breach of warranty against redhibitory defects, even there, the allegations are that the retailer/seller defendants "failed to give Petitioner notice of the dangerous side-effects" of the medications they sold and "failed to adequately inform the Petitioner of the dangers inherent" in them (Petition, ¶ 16) When read in the context of the entire petition, plaintiff's purported redhibition and breach-of-warranty claims are nothing more than a restatement of the personal-injury claims, which are not recoverable in an action for redhibition/breach of warranty.

Furthermore, under La Civ Code art. 2520, "The seller warrants the buyer against redhibitory defects, or vices, in the thing sold" The terms "defects" or "vices" within the meaning of this article contemplate "physical imperfection or deformity, a lacking of a necessary competent or level of quality." *Scogin v Smuth*, 612 So 2d 739, 741 (La. App. 1 Cir 1992), *Perksin v Bayer* (**Exhibit E** attached, at 3). Examples of redhibitory vices include a cracked engine block, termite damage, an inadequate building foundation, and a contaminated Popsicle *PPG Industries, Inc. v. Industrial Laminates Corp*, 664 F.2d 1332, 1336 (5th Cir 1982). *See also Lonkowski v. R J Reynolds Tobacco Co*, 1996 WL 888182 (W D La. Dec 10, 1996) "The existence of such a defect gives a buyer the right to obtain rescission of the sale." La Civ. Code art 2520 Here, plaintiffs do not plead a redhibitory defect or seek rescission within the meaning of Article 2520 Instead, they seek personal-

injury damages because the retailer/seller defendants failed to notify and warn them of side-effects of the medications. Those allegations are essentially that the product was "unreasonably dangerous" under the LPLA, La R.S. 9:2800.51, *et seq.* But plaintiffs have not alleged that Walgreen is a "manufacturer "

3. Plaintiffs have no viable claim against Walgreen as a seller who knew of the alleged defect

La Civ Code art 2545 provides that "[a] seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the purchase price with interest from the time it was paid, for the reimbursement of reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney's fees " The article further provides that "[a] seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing "

In contrast to a manufacturer's presumed knowledge of the alleged defect and its possible resultant liability as a "bad-faith seller" under Article 2545, a plaintiff must prove that a non-manufacturing seller had knowledge of the alleged defect in order to recover against it under this codal article. *See McGough v. Oakwood Mobile Homes, Inc.*, 779 So 2d 793, 802 (La. App. 2d Cir. 2000) ("A seller who is not the manufacturer of the thing is not presumed to have knowledge of the defect, it must be proven that the seller knew of the defect"), *Strickland v. Brown Morris Pharmacy, Inc.*, 1996 WL 537736, *2 (E.D. La. Sept. 20, 1996) ("[I]n Louisiana, a non-manufacturer seller of a defective product may be liable for

damages only if he knew or should have known of the dangerous characteristic of the product" (citing *Winchell v. Johnson Properties, Inc.*, 640 So 2d 399, 401 (La App 3rd Cir 1994) and La Civ Code art 2545.)), *In Re Diet Drugs*, 1998 WL 254976, *4, n 6 (E D Pa Apr 16, 1998) ("[U]nder Louisiana law, a retailer can be liable to a consumer for breach of an implied warranty only upon showing that the retailer knew or should have known that the product is unwholesome")

Plaintiffs seek damages and attorney's fees from Walgreen by invoking La Civ Code art 2520, et seq (warranty against redhibitory defects), art. 2524 (failure to sell a product fit for ordinary usage where the buyer relies on the retailer's skill or judgment in selecting the thing), and art 2529 (thing delivered is different from the kind that the contract or the seller represents) (Petition, ¶ 17) Plaintiffs allege in a conclusory fashion that the retailer/seller defendants "had actual knowledge of the existence of said redhibitory defects at the time of the sale," that they "knew Petitioner's intended usage of the subject over-the-counter medications and knew of Petitioner's reliance on the skill and judgment of retailer/seller defendants in the sale of their over-the-counter medications," and that they "misrepresented" the medications "as being safe for human consumption" and "failed to adequately inform" plaintiff of their alleged inherent dangers *Id* But plaintiffs do not allege that they spoke to a Walgreen employee or received anything other than the prepackaged and sealed medication that Mrs Donnelly herself selected and chose to buy Moreover, plaintiffs completely negate their own allegations by asserting that the "[p]harmaceutical manufacturer defendants failed to alert . . . retail dealers who would be expected to sell and/or recommend its products, of the hazards

associated with said products' usage, and further actively promoted and advertised their products in a manner that suggested the design of their products was safe " (Petition, ¶ 15) Thus, the complaint precludes recovery under Articles 2520, 2524, 2529, and 2545 Conclusory allegations contradicted by other portions of the complaint cannot defeat federal jurisdiction, and they fail to warrant remand See *Perksin v. Bayer* (Exhibit E attached, at 5-6)

Again, Walgreen's responses to requests for admission pierce the conclusory allegations of plaintiffs' petition See **Exhibits A and B** attached Walgreen admits that it did not manufacture the medications or hold itself out as a manufacturer, that it had no control or influence over any characteristic of the unaltered, prepackaged, and sealed medications that it sold, that it did not know of or omit to declare any alleged defect in the medications, and that it made no warranties concerning the testing, safety, effectiveness, or ingredients of the medicines (Response Nos 2-9) Thus, plaintiffs have not alleged and cannot establish the necessary elements of a claim against Walgreen under Article 2545 See *Perksin v Bayer* (**Exhibit E** attached, at 5-6)

At page 4 of their memorandum, plaintiffs assert that "evidence will be exchanged during discovery and likewise be presented during trial which proves that defendants knowingly concealed that its PPA containing products were potentially unsafe for human consumption " But this Court must look to the petition at the time of removal Plaintiffs cannot make conclusory allegations and assert that future discovery may show that a fraudulently joined defendant is culpable *Strickland*, cited above

4. Plaintiffs have not alleged a claim against Walgreen under La. Civ. Code art. 2531

La Civ Code art. 2531 provides that a seller who did not know that the thing he sold had a defect is bound to repair, remedy, or correct it. If a good-faith seller cannot or fails to do so, he may be bound to return the price to the buyer with interest from the time that it was paid and to reimburse the buyer for the reasonable expenses occasioned by the sale, as well as those incurred to preserve the thing less a credit to which the seller is entitled if the buyer made use of the thing or obtained some value from it. Article 2531 is irrelevant to plaintiffs' claims and serves as no reasonable basis for stating a claim against Walgreen.

Plaintiffs do not mention La. Civ. Code art. 2531 in the complaint or seek relief under it against Walgreen as a good-faith seller. The motion to remand and the petition seek damages and attorney's fees against it only as a "bad-faith" seller who allegedly knew of the alleged defect at the time of sale. Moreover, under La Civ Code art. 2520, "[t]he seller warrants the buyer against redhibitory defects, or vices, in the thing sold" and that "[t]he existence of such a defect gives a buyer the right to obtain rescission of the sale." Plaintiffs have not pleaded that Walgreen rescind the sale, return the purchase price, and pay for the sale expenses. The prayer contains no paragraph referencing La Civ Code art. 2531 or seeking such recovery of such special damages, which must be specifically alleged. "Without such basic details, plaintiff is making only conclusory allegations that cannot support remand." See *Perksin v Bayer* (Exhibit E attached, at 4).

Moreover, even if alleged, such a de minimis claim cannot defeat removal jurisdiction. See *Perksin v Bayer* (Exhibit E attached, at 6-7)

Furthermore, under La. Civ. Code art. 2522, “[t]he buyer must give the seller notice of the existence of a redhibitory defect in the thing sold.” The buyer must “tender” the allegedly defective product by offering to return it to the seller before filing any action in redhibition. See *Lindy Investments v Shakertown Corp.*, 209 F.3d 802, 805-06 (5th Cir. 2000). Under La. Civ. Code art. 2522, a buyer is not required to give notice when “the seller has actual knowledge of the existence of the redhibitory defect in the thing sold.” But Walgreen’s responses pierce any conclusory allegations that it had knowledge of any alleged hazard concerning the medications in this case. Indeed, as noted above, plaintiffs allege that the manufacturers “failed to alert . . . retail dealers who would be expected to sell and/or recommend its products, of the hazards associated with said products’ usage.” (Petition, ¶ 15)

Plaintiffs do not allege that they gave any notice to Walgreen of any alleged redhibitory defect in the medications, that they requested that it return the purchase price, or that they tendered the unused products to it. They have failed to plead and meet the basic prerequisites for a valid cause of action in redhibition or breach of warranty against them under Article 2531. See *Perksin* (Exhibit E attached, at 4-5)

C. Plaintiffs have no viable tort claim against Walgreen under Louisiana law

Plaintiffs’ tort-based claims against Walgreen are not viable under Louisiana law and serve as no grounds for contesting defendants’ well-founded removal based on fraudulent joinder. Plaintiffs allege that Walgreen is a non-manufacturing retailer

(Petition, ¶¶ 3 and 17) "A non-manufacturer seller of a defective product is responsible for damages in tort, only if he knew or should have known that the product sold was defective and failed to declare it" *LeBleu v Homelite Div. of Textron, Inc*, 509 So.2d 563, 565 (La App 3d Cir 1987), *Perksin v. Bayer* (Exhibit E attached, at 9-10). "When a product is in a sealed container or package, a vendor is entitled to reasonably rely on the assumption that the product is not defective" *Barrett v R J Reynolds Co.*, 1999 WL 460778, *2 (E D La. June 29, 1999) "The non-manufacturer vendor is not required to inspect the product prior to sale to determine the possibility that non-apparent inherent defects might exist." *Piccolo v. Flex-A-Bed, Inc*, 466 So 2d 652, 654 (La App 5th Cir), writ denied, 467 So 2d 1134 (La. 1985) A seller additionally "has no duty to warn or instruct the buyers on proper use" *Strickland v Brown Morris Pharmacy Inc*, 1996 WL 537736, *2

Although a manufacturer of an allegedly defective product is presumed to know of the defect, the manufacturer's knowledge is not imputed to a mere seller under Louisiana law *Holloway v Gulf Motors, Inc.*, 588 So 2d 1322, 1327 (La. App 2d Cir 1991) (record was devoid of facts to support a conclusion that Gulf was a bad-faith seller, it was merely a retailer, and no evidence existed that Gulf had held out the product as its own), *Barrett v. R.J. Reynolds Co*, 1999 WL 460778, *2 ("A distributor or retailer who did not manufacture, design or alter prior to sale a defective product is not responsible for injury or damages resulting from such product in the absence of a showing that he knew or should have known the product was defective"), *Strickland v Brown Morris Pharmacy, Inc.*, 1996 WL 537736, *3 ("[I]n Louisiana a non-manufacturer seller of a defective product may

be liable for damages only if he knew or should have known of the dangerous characteristic of the product").

Plaintiffs assert at pages 4-5 of their memorandum that fraud may result from inaction or silence. But both federal and Louisiana procedure require a plaintiff to plead allegations of fraud with particularity. Fed.R.Civ.P. 9(b), La. Code Civ. P. art. 856. The plaintiff must state the "who, what, when, and where" of the fraud. *Williams v. WMX Technology*, 112 F.3d 175, 177-78 (5th Cir. 1995), *cert. denied*, 522 U.S. 966 (1997). General conclusions of fraud without particular allegations must be disregarded. *Hardy v. Easy T.V. and Appliances of Louisiana*, 804 So.2d 777, 781 (La. App. 4 Cir. 2001). Furthermore, a claim of fraud or intentional misrepresentation cannot be based on mere negligence or a mistake; a knowing and purposeful intent to deceive in order to obtain an unjust advantage is an essential element of the tort. *Bass v. Coupel*, 671 So.2d 344, 347 (La. App. 1 Cir. 1995), *writ denied*, 669 So.2d 426 (La. 1996). Even negligent misrepresentation requires that the defendant must owe a duty to supply correct information and breach it. *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007, 1015 (La. 1993). Likewise, a civil "conspiracy" is not actionable without an underlying tort that the parties agree to perpetrate and actually commit to bring about an intended outcome or result. La. Civ. Code art. 2324, *Johnson v. CHL Enterprises*, 115 F.Supp. 723, 731 (W.D.La. 2000), *Butz v. Lynch*, 710 So.2d 1171, 1174 (La. App. 1 Cir.), *writ denied*, 721 So.2d 473 (La. 1998).

In denying a motion to remand in *Strickland v. Brown Morris Pharmacy, Inc.*, cited above, Judge Fallon recognized that a seller has no duty to inspect a product or warn a buyer on its use, that conclusory allegations against the non-manufacturing retailer did

not establish a cause of action, and that the plaintiff did not even allege that the consumer had consulted with or talked to any employee or owner of the pharmacy before purchasing the medication 1996 WL 537736, *2, n3 Here, as in *Strickland*, plaintiffs have alleged no facts to support the contention that Walgreen, a non-manufacturing seller of FDA-regulated medications in sealed packages, knew or should have known of the alleged hazards and warn about them at the time of the alleged sales Indeed, plaintiffs' own petition refutes any claim of Walgreen's actual or constructive knowledge by alleging that the "[p]harmaceutical manufacturer defendants failed to alert . . . retail dealers who would be expected to sell and/or recommend its products, of the hazards associated with said products' usage . . . " (Petition, ¶ 14) In response to the requests for admission, Walgreen establishes that it did not know of or omit to declare any alleged defect in the medications that it sold, and that it neither made nor implied any warranties concerning the testing, safety, effectiveness, or ingredients of the medicines See **Exhibits B and C** (Response Nos 2-9) Thus, plaintiffs have no viable claim in negligence, want of care, gross negligence, strict liability, fraud, misrepresentation, or conspiracy against Walgreen as a non-manufacturing seller without knowledge of any alleged hazards or side-effects concerning the prepackaged medications

CONCLUSION

This Court need not address plaintiffs' motion to remand pending a final ruling of the Panel on transfer of the case to MDL-1407. Alternatively, the remand motion is meritless Plaintiffs have fraudulently joined Smoothie King and Walgreen Their citizenships should be disregarded because the petition and the undisputed facts show

that plaintiffs have pleaded no viable cause of action under Louisiana law against those defendants. This Court has proper diversity jurisdiction over this action, and plaintiffs' motion to remand should be denied.

Respectfully submitted,



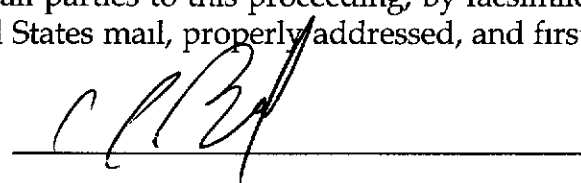
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New Orleans, LA 70163-2300
Telephone No. (504) 585-7000
Attorneys for Bayer Corporation



Joy G. Braun (#3416)
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SESSIONS, FISHMAN & NATHAN, L.L.P.
201 St. Charles Avenue, Suite 3500
New Orleans, LA 70170
Telephone (504) 582-1500
**Attorneys for Novartis Pharmaceuticals
Corporation and Novartis Consumer Health,
Inc.**

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 27th day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by facsimile transmission or by mailing the same by United States mail, properly addressed, and first class postage prepaid.



23

AFFIDAVIT OF STEVE KUHNAU

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state set forth above, personally came and appeared.

STEVE KUHNAU

who, after being duly sworn, deposed and stated the following

1.

I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, could and would competently testify to the following

2

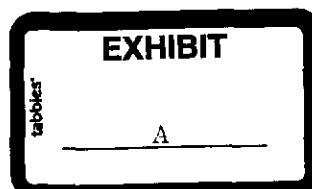
The Smoothie King store located at 3366 Paris Road, Chalmette, Louisiana is the only store operated in Chalmette, Louisiana and there has been no other store operating in that geographic location in the history of the Smoothie King franchising business.

3

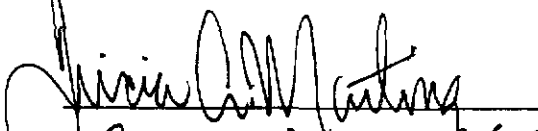

The Franchise Agreement #20 which authorizes this Chalmette, Louisiana location was executed by franchisees on October 9, 1991

4

This Smoothie King store opened on February 17, 1992 at the location of 3366 Paris Road, Chalmette, Louisiana



WITNESSES


STEVE KUHAU
Chairman, Board of Directors

SWORN TO AND SUBSCRIBED before me, this 26 day of July, 2002, in New Orleans,
Louisiana


Notary Public

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHNE B. DONNELLY
AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORP., NOVARTIS
CONSUMER HEALTH, INC., 4LIFE RESEARCH,
L.C. SUCCESSOR BY MERGER TO SHAPERITE
SMOOTHIE KING CO., SMOOTHIE KING
SYSTEMS, INC., WALGREEN LOUISIANA
COMPANY, INC. (D/B/A "WALGREENS")

* CIVIL ACTION NO.
* 02-2436

* SECTION " N "

* MAGISTRATE "1"

RESPONSES TO REQUESTS FOR ADMISSION

NOW INTO COURT, through undersigned counsel, comes defendant, Walgreen Louisiana Company, Inc., who responds to the Request for Admissions of defendant, Novartis Consumer Health, Inc., as follows:

Request for Admission No. 1:

Walgreen operated and operates drug stores in Louisiana under the name "Walgreens."

RESPONSE TO REQUEST NO. 1:

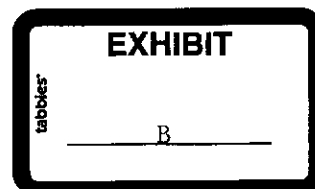
Admitted.

Request for Admission No. 2:

In the State of Louisiana, Walgreens sold Tavist-Dø products, manufactured by Novartis Consumer Health, Inc.

RESPONSE TO REQUEST NO. 2:

Admitted.



Request for Admission No. 3:

At no time did Walgreen design, manufacture, test, process, label, package, distribute, sell, market, warrant, promote, represent, or advertise Tavist-D® products as its own products or hold itself out to the public as the manufacturer of Tavist-D® products

RESPONSE TO REQUEST NO. 3:

Admitted

Request for Admission No. 4:

At no time did Walgreen exercise or attempt to exercise any control or influence over any characteristic of the design, composition, warnings, warranties, or quality of Tavist-D® products.

RESPONSE TO REQUEST NO. 4:

Admitted.

Request for Admission No. 5:

Walgreen purchased for resale all Tavist-D® products in sealed packages that had been labeled and packaged by the respective manufacturer.

RESPONSE TO REQUEST NO. 5:

Admitted

Request for Admission No. 6:

Walgreen sold Tavist-D ® products in the same sealed packages without altering or repackaging in any manner the contents of the packages.

RESPONSE TO REQUEST NO. 6:

Admitted

Request for Admission No. 7:

Walgreen displayed for sale in its drug stores the Tavist-D® products with other medicines and cold remedies manufactured by companies other than Novartis Consumer Health, Inc

RESPONSE TO REQUEST NO. 7:

Admitted.

Request for Admission No. 8:

Walgreen did not know of, or omit to declare, any problems, dangerous risks, hazards, or facts indicating that the Tavist-D® products that it sold had a defect or were unsafe, hazardous, or harmful in their normal and intended uses

RESPONSE TO REQUEST NO. 8:

Admitted.

Request for Admission No. 9:

Walgreen did not know of, or omit to declare, any characteristic in the Tavist-D® products that it sold that rendered these products unreasonably dangerous for normal use or that rendered these products useless or so inconvenient that it must be presumed that buyers would not have bought these products if they had known of the defect.

RESPONSE TO REQUEST NO. 9:

Admitted.

Request for Admission No. 10:

Walgreen did not know of, nor did it omit to declare, any defect in the Tavist-D® products that it sold

RESPONSE TO REQUEST NO. 10:

Admitted.

Request for Admission No. 11:

Walgreen neither made nor implied any warranties whatsoever concerning the testing, safety, effectiveness, or ingredients of the Tavist-D® products that it sold.

RESPONSE TO REQUEST NO. 11:

Admitted.

Request for Admission No. 12:

At no time prior to filing of suit did the plaintiff(s) in this case give notice to Walgreen of any alleged redhibitory defect in the Tavist-D® products that plaintiff had allegedly purchased from Walgreen.

RESPONSE TO REQUEST NO. 12:

Admitted

Request for Admission No. 13:

At no time prior to filing of suit did plaintiff in this case tender Tavist-D ® products to Walgreen for a rescission of the sale and return of the purchase price and expenses of sale.

RESPONSE TO REQUEST NO. 13:

Admitted.

Respectfully submitted,

THE TRUITT LAW FIRM
A Limited Liability Company


JACK E. TRUITT, BAR NO. 18476, T.A.
251 Highway 21

Madisonville, Louisiana 70447

Telephone: (985) 792-1062

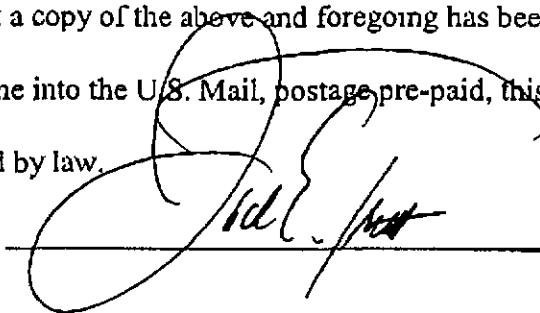
Facsimile: (985) 792-1065

Email: mail@truittlaw.com

Counsel for Walgreen Louisiana Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served on all counsel of record by depositing same into the U.S. Mail, postage pre-paid, this September 23, 2002, or by any other means authorized by law.

A handwritten signature in black ink, appearing to be "J. L. Smith", is written over a horizontal line.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY
AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORP , NOVARTIS
CONSUMER HEALTH, INC., 4LIFE RESEARCH,
L.C SUCCESSOR BY MERGER TO SHAPERITE
SMOOTHIE KING CO , SMOOTHIE KING
SYSTEMS, INC., WALGREEN LOUISIANA
COMPANY, INC (D/B/A "WALGREENS")

* CIVIL ACTION NO.
* 02-2436
*
* SECTION " N "
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* MAGISTRATE "1"
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RESPONSES TO REQUESTS FOR ADMISSION

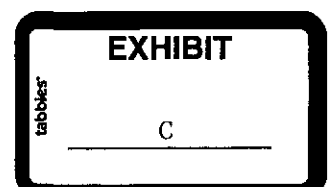
NOW INTO COURT, through undersigned counsel, comes defendant, Walgreen Louisiana Company, Inc , who responds to the Request for Admissions of defendant, Bayer Corporation, as follows:

Request for Admission No. 1:

Walgreen sold in the State of Louisiana various Alka Seltzer Plus effervescent medicines manufactured by Bayer that contained Phenylpropanolamine ("PPA"), including Alka Seltzer Plus Cold effervescent medicine, Alka Seltzer Plus Cold & Sinus effervescent medicine, Alka Seltzer Plus Night Time effervescent medicine, Alka Seltzer Plus Cold and Cough effervescent medicine and Alka Seltzer Plus Cold & Flu effervescent medicine (collectively the "Alka Seltzer Plus Effervescent Medicines")

RESPONSE TO REQUEST NO. 1:

Admitted



Request for Admission No. 2:

At no time did Walgreen design, manufacture, test, process, label, package, distribute, sell, market, warrant, promote, represent, or advertise Alka Seltzer Plus Effervescent Medicines as its own products, or otherwise hold itself out to the public as a manufacturer of Alka Seltzer Plus Effervescent Medicines

RESPONSE TO REQUEST NO. 2:

Admitted

Request for Admission No. 3:

At no time did Walgreen exercise or attempt to exercise any control or influence over any characteristic of the design, composition, warnings, warranties, or quality of Alka Seltzer Plus Effervescent Medicines

RESPONSE TO REQUEST NO. 3:

Admitted

Request for Admission No. 4:

Walgreen purchased for resale all Alka Seltzer Plus Effervescent Medicines in sealed packages, which had been labeled and packaged by the manufacturer.

RESPONSE TO REQUEST NO. 4:

Admitted

Request for Admission No. 5:

Walgreen sold Alka Seltzer Plus Effervescent Medicines in the same sealed packages without altering or repackaging in any manner the contents of the packages.

RESPONSE TO REQUEST NO. 5:

Admitted

Request for Admission No. 6:

Walgreen displayed for sale in its drug stores the Alka Seltzer Plus Effervescent Medicines with other manufacturers' over-the-counter drugs and cold remedies

RESPONSE TO REQUEST NO. 6:

Admitted.

Request for Admission No. 7:

Walgreen did not know of or omit to declare any alleged defect in the Alka Seltzer Plus Effervescent Medicines that it sold

RESPONSE TO REQUEST NO. 7:

Admitted.

Request for Admission No. 8:

Walgreen neither made nor implied any warranties whatsoever concerning the testing, safety, effectiveness, or ingredients of the Alka Seltzer Plus Effervescent Medicines.

RESPONSE TO REQUEST NO. 8:

Admitted

Request for Admission No. 9:

At no time prior to filing of suit did the plaintiff(s) in this case give notice to Walgreen of any alleged redhibitory defect in the Alka Seltzer Plus Effervescent Medicines that plaintiff(s) had allegedly purchased from Walgreen

RESPONSE TO REQUEST NO. 9:

Admitted.

Request for Admission No. 10:

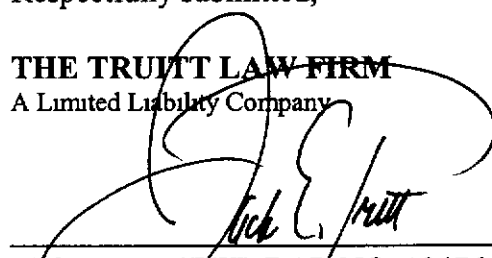
At no time prior to filing of suit did plaintiff(s) in this case tender Alka Seltzer Plus Effervescent Medicines to Walgreen for a rescission of the sale and return of the purchase price and expenses of sale

RESPONSE TO REQUEST NO. 10:

Admitted.

Respectfully submitted,

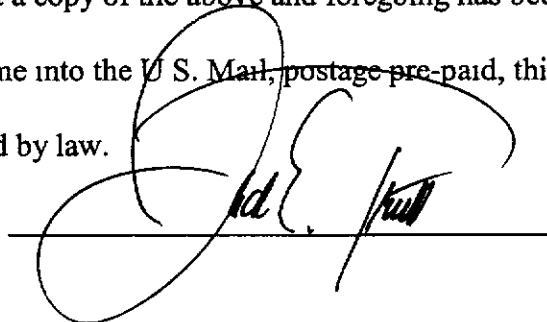
THE TRUITT LAW FIRM
A Limited Liability Company



JACK E TRUITT, BAR NO 18476, T.A.
231 Highway 21
Madisonville, Louisiana 70447
Telephone: (985) 792-1062
Facsimile (985) 792-1065
Email: mail@truttlaw.com
Counsel for Walgreen Louisiana Company, Inc

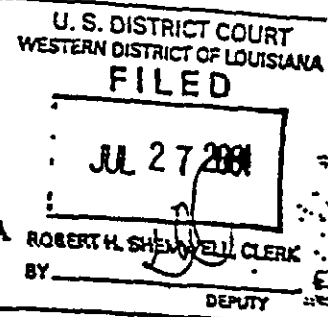
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served on all counsel of record by depositing same into the U S. Mail, postage pre-paid, this September 17, 2002, or by any other means authorized by law.



M

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION



| | |
|---------------------------|----------------------------|
| ROBERT WILLIAMS | * CIVIL ACTION NO. 01-0690 |
| VERSUS | * JUDGE WALTER |
| WARNER-LAMBERT CO., ET AL | * MAGISTRATE JUDGE HAYES |

RULING

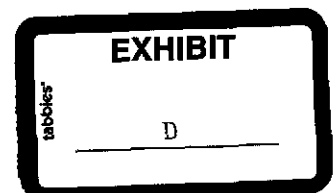
Before the court is a motion to remand filed by plaintiffs (Document #8).¹ For reasons stated below, the motion to remand is **DENIED**.

This matter was filed in the Fifth Judicial Court for the Parish of Richland on March 19, 2001, seeking damages arising as a result of taking Rezulin, a prescription drug used in the treatment of diabetes. Defendants timely removed this matter on the basis of diversity jurisdiction, maintaining that the plaintiff fraudulently joined Tom's Drug, Carol C. Eley and David M. Clary. The plaintiff moved to remand the case to State court, based on a lack of complete diversity of citizenship. In response, defendants assert that the plaintiff has no claim for failure to warn about adverse side effects against the pharmacy that dispensed the drug or against the pharmaceutical representatives who provided the drug to the pharmacies, because under Louisiana law neither the pharmacy nor the pharmaceutical representatives have such a duty.

A party claiming fraudulent joinder carries a heavy burden of persuasion and must show either that there is no possibility that the plaintiff would be able to establish a cause of action against

¹As this is not one of the motions excepted in 28 U.S.C. §636(b)(1)(A), nor dispositive of any claim on the merits within the meaning of Rule 72 of the Federal Rules of Civil Procedure, this ruling is issued under the authority thereof, and in accordance with the standing order of this court. Any appeal must be made to the district judge in accordance with Rule 72(a) and L.R. 74.1(W).

66



the non-diverse defendants or that there has been outright fraud in the plaintiff's pleadings of the jurisdictional facts. *B., Inc., v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981). This Court does not decide whether the plaintiff will actually or even probably prevail on the merits, but looks only for a possibility that he may do so. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40 (5th Cir. 1992).

The court finds that the defendants have satisfied their burden. Under Louisiana law, a pharmacist has a limited duty with regard to filling prescriptions for medications.

A pharmacist has a duty to file a prescription correctly and to warn the patient or to notify the prescribing physician of an excessive dosage or of obvious inadequacies on the face of the prescription which create a substantial risk of harm to the patient. *Guillory v. Dr. X*, 679 So.2d 1004, 1010 (La.App. 3 Cir. 1996)(citing *Hayes v. Travelers Insurance Company*, 609 So.2d 1084 (La.App. 2 Cir. 1992) writ denied, 613 So.2d 975 (La. 1993)).

However, a pharmacist does not have a duty to warn customers of the hazardous side effects associated with a drug. *Gassen v. East Jefferson General Hospital*, 628 So.2d 256, 259 (La.App. 5 Cir. 1993). Because Louisiana law limits a pharmacist's liability to properly and warning of overdoses, the pharmacy had no duty to warn the plaintiff about possible side effects, and there can be no claim against it in either tort or redhibition.

Plaintiff cannot establish liability against defendant Carol Eley for two reasons. First, Eley's unrefuted affidavit establishes that he never called on any physician in Richland Parish, and thus could not have called on the plaintiff's physician. Therefore, pretermittting an argument regarding any duties he might have had, there is no basis on which plaintiff could possibly establish a cause of action against Eley.


Finally, under Louisiana law, the only personal duty a detail man or pharmaceutical representative has toward a plaintiff is to deliver and explain the new package inserts to the physicians within the detail man's territory. *Wallace v. Upjohn Company*, 535 So.2d 1110, 1117

(La.App. 1 Cir. 1988). Eley and Clary, have both submitted unrefuted affidavits stating that they supplied physicians with copies of the FDA approved package insert regarding Rezulin each time they supplied information regarding Rezulin, and that, if questions were raised by physicians not addressed by the package insert, then Eley and Clary both put the doctor in contact with the 1-800 number for Warner-Lambert medical affairs. Under Louisiana law, they had no other duty.

Plaintiff makes conclusory allegations of fraud against Eley and Clary, but his pleadings fail to meet the particularity standard for pleading fraud under FRCP Rule 9(b), and in any case are insufficient to overcome the unrefuted affidavits. Thus, there is no basis for personal liability against either Eley or Clary.

Given the unrefuted affidavits of the defendants, the lack of any factual allegations or support for the conclusory allegations contained within the plaintiff's original petition, and the limited duties imposed on territory managers under Louisiana law, it is the finding of this court that the plaintiff has no legitimate claim against the territory managers and that they were improperly joined in these proceedings. Therefore, plaintiff's motion to remand is DENIED.

THUS DONE AND SIGNED at Monroe, Louisiana, this 27th day of July, 2001.


 KAREN L. HAYES
 UNITED STATES MAGISTRATE JUDGE

COPY SENT:
 DATE: 7/21/01
 BY: J.M. Hughes
 TO: Sandy J. Quinry
Sinnott, Sander

RECEIVED
FEB 26 2002
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CV 01 02023 J00000037

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES PERKSIN,

Plaintiff,

v.

BAYER CORPORATION, et al.,

Defendants.

NO. C01-2023R

ORDER DENYING PLAINTIFF'S
MOTION FOR REMAND

THIS MATTER comes before the court on the motion of plain-
tiff James Perkins to remand the case to state court in Louisi-
ana. Having reviewed the papers filed in support of and in
opposition to this motion, the court rules as follows:

I. BACKGROUND

Plaintiff purchased the over-the-counter drugs Alka-Seltzer
Plus Cold Medicine, Robitussin CF, and Contac 12 Hour Cold
Capsules from an unidentified Rite Aid drugstore in Caddo Parish,
Louisiana. Plaintiff later consumed the medication. Sometime
during 1998, plaintiff suffered a stroke. The medicines con-
tained the ingredient Phenylpropanolamine ("PPA"). On August 24,
2001, plaintiff filed a complaint in Louisiana state court that
links the PPA in the cold medicine with plaintiff's stroke.

The complaint alleges several causes of action against

ORDER
Page - 1 -

EXHIBIT

tabbies

E

1 manufacturers and distributors of products that contain PPA.
2 The complaint also names K & B Louisiana Corporation ("K&B") as
3 a defendant in two of the causes of action, breach of warranty
4 in redhibition and negligence. K&B operates Rite Aid drugstores
5 throughout Louisiana that sell over-the-counter medications
6 containing PPA.

7 Defendants removed the complaint to federal court on the
8 basis that plaintiff fraudulently joined K&B as a defendant.
9 Plaintiff then moved to remand to state court. After the parties
10 briefed the motion, the case was transferred to this court as
11 part of a multi-district litigation.

12

13 II. ANALYSIS

14 A plaintiff cannot defeat federal jurisdiction by fraudu-
15 lently joining a non-diverse party against whom "there is no
16 reasonable basis for predicting that plaintiffs might establish
17 liability" Badon v. RJR Nabisco, Inc., 224 F.3d 382, 292
18 (5th Cir. 2000). The court determines jurisdiction based on the
19 claims as stated at the time of removal; arguments about what
20 future discovery may reveal cannot justify remand. See Cavallini
21 v. State Farm Mut. Auto. Ins. Co., 44 F.3d 256, 264 (5th Cir.
22 1995). The court must view the facts in the light most favorable
23 to the plaintiff; however, the court may pierce the pleadings and
24 consider "summary judgment-type evidence." Id. at 263. A
25 plaintiff also cannot defeat removal by relying on conclusory
26 allegations that fail to state a cause of action. See Jernigan

ORDER

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1 v. Ashland Oil, Inc., 989 F.2d 812 (5th Cir. 1993); Addition v.
2 Allstate Ins. Co., 58 F. Supp.2d 729, 733-34 (E.D. La. 1996).

3 Defendants allege that plaintiff fraudulently joined defen-
4 dant K&B, while plaintiff claims that he has a legitimate con-
5 tract cause of action against K&B for breach of warranty in
6 redhibition, under La. Civ. Code art. 2520 et seq., and a cause
7 of action against K&B in negligence. Plaintiff does not argue
8 that any other causes of action in the complaint apply to K&B.

9 A. Breach of Warranty in Redhibition

10 Under Louisiana law, a seller "warrants the buyer against
11 redhibitory defects, or vices, in the thing sold." La. Civ. Code
12 art. 2520. A redhibitory defect or vice involves a "physical
13 imperfection or deformity, a lacking of a necessary competent or
14 level of quality." Scogin v. Smith, 612 So.2d 739, 741 (La. Ct.
15 App. 1992). The buyer of a product with a redhibitory defect
16 must tender the product to the seller and seek rescission of the
17 sale. La. Civ. Code art. 2520, 2530. A good faith seller is
18 liable only for the cost of the product if it cannot repair the
19 item. La. Civ. Code art. 2531. The buyer can hold a bad faith
20 seller liable for consequential damages and attorney's fees as
21 well. La. Civ. Code art. 2545.

22 1. Failure to Plead Elements of Redhibition

23 It is unclear from the motion to remand whether plaintiff
24 is alleging a cause of action against K&B as a good faith seller
25 under La. Civ. Code art. 2531 or as a bad faith seller under
26 article 2545. While a portion of the memorandum argues that K&B

1 knew of the medications' alleged redhibitory effects, the same
2 brief distinguishes bad faith cases and focuses on K&B's poten-
3 tial status as a good faith seller. Regardless, the complaint
4 does not include sufficient facts to support a claim against K&B
5 under either theory.

6 a. Article 2531

7 First, the complaint never alleges liability under article
8 2531. The only redhibition liability provision cited is article
9 2545, which applies to bad faith sellers who knew of the defect.
10 In the damages portion of the complaint, plaintiff again cites
11 article 2545 and fails to cite article 2531. By its own terms,
12 the complaint does not allege a cause of action against K&B under
13 article 2531.

14 Second, the allegations of the complaint fail to provide
15 specific facts that would support a cause of action against K&B
16 under article 2531 even if plaintiff had invoked that provision.
17 As explained above, the court must assess the remand motion based
18 on the facts as stated in the complaint, and the court may pierce
19 the pleadings to assess conclusory allegations. The complaint
20 does not allege that plaintiff sought rescission of the sale, nor
21 does it allege that plaintiff provided K&B with notice of the
22 alleged defect, nor does it provide details regarding where and
23 when plaintiff purchased the products. Without such basic
24 details, plaintiff is making only conclusory allegations that
25 cannot support remand. See Jernigan, 989 F.2d 812; Addition, 58
26 F. Supp.2d at 733-34.

ORDER

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1 The complaint fails to allege that plaintiff sought rescis-
2 sion of the sale and return of the purchase price - a key element
3 of redhibition. Cf. Mitchell v. Popiwchak, 677 So.2d 1050, 1054
4 (La. Ct. App. 1996) (request for purchase price satisfies tender
5 requirement). Plaintiff argues that the complaint alleges
6 rescission as a remedy, but there is no allegation that plaintiff
7 sought rescission prior to filing the lawsuit as required.

8 In addition, notice and tender are prerequisites to bringing
9 a redhibition claim. See Lindy Inv., LP v. Shakertown Corp., 209
10 F.3d 802, 805-06 (5th Cir. 2000). Plaintiff does not allege that
11 K&B received notice of the defect, much less allege that plain-
12 tiff tendered the product to K&B. Finally, plaintiff fails to
13 allege any details regarding the store that sold the medication.
14 Cf. Long v. Bruns, 727 So.2d 664 (La. Ct. App. 1999) (complaint
15 dismissed for failure to plead proper seller). By failing to
16 allege many of the basic elements of a cause of action under
17 section 2531, plaintiff has no reasonable possibility of holding
18 K&B liable.

19 **b. Article 2545**

20 Article 2545 applies to bad faith sellers who knew or should
21 have know of the defect. La. Civ. Code art. 2545. Plaintiff
22 alleges in the complaint that "all Defendants have actual knowl-
23 edge" of the alleged defects. This statement lacks factual
24 support, contradicts other portions of the complaint, and fails
25 to warrant remand.

26 As explained above, a plaintiff cannot defeat federal

ORDER

Page - 5 -

1 jurisdiction by relying solely on conclusory allegations.
2 Plaintiff provides no factual support for the broad allegation
3 that the drugstore knew of potential dangers in the medications.
4 On remand, the parties may pierce the pleadings with additional
5 evidence to clarify such allegations. Defendants have supplied
6 the court with requests for admission from K&B that refute
7 plaintiff's assertion. K&B had no control over the pre-packaged,
8 sealed medications and had no knowledge of any potential dangers.
9 Def. Mem., Exhibit A. Plaintiff has not countered with any
10 specific facts to support its broad allegation.

11 Moreover, plaintiff's own complaint acknowledges that K&B
12 had no knowledge of alleged defects. For example, the complaint
13 alleges that the medication did not change from the time it left
14 the manufacturers to the time it reached the customer. It also
15 alleges that the manufacturers had exclusive possession of
16 information about potential hazards. In the negligence allega-
17 tions, the complaint accuses the manufacturers of knowing about
18 dangers but does not include K&B in those allegations. These
19 statements contradict plaintiff's conclusory allegation that K&B
20 knew or should have known about a potentially redhibitory effect.
21 Plaintiff has failed to plead facts to state a cause of action
22 under article 2545 and has no reasonable probability of success
23 against K&B.

24 2. Plaintiff's Claims are De Minimis

25 Remanding this case also would prove inequitable. The only
26 relief from K&B to which plaintiff would be entitled, if the

ORDER

Page - 6 -

1 complaint properly pleaded the elements of a cause of action
2 under article 2531, would be the purchase price of the medica-
3 tion. Such a tenuous cause of action based on de minimis recov-
4 ery should not defeat federal jurisdiction. As the court in a
5 class action involving other over-the-counter drugs sold by good
6 faith Louisiana pharmacies stated, such claims are "improper at
7 best and fraudulent at worst." In re Diet Drugs, 1998 WL 254976,
8 at 4 (E.D. Pa. 1998). The court denied a motion to remand
9 because the plaintiff had fraudulently joined the pharmacies.
10 Id. Similarly, the alleged cause of action against K&B would
11 accomplish minimal recovery, if any.

12 3. No Cause of Action in Redhibition Exists Against
13 Pharmacies for Sale of Medication

14 Louisiana law prohibits liability against a pharmacy or
15 drugstore that sells allegedly defective or dangerous medication.
16 In re Rezulin Prod. Liab. Litig., 133 F. Supp.2d 272, 289
17 (S.D.N.Y. 2001) (describing law of Louisiana and similar rule in
18 several other states). Pharmacists have no duty to warn of
19 potential side effects from prescription drugs nor a duty to
20 inspect the medication. See Gassen v. East Jefferson Gen. Hosp.,
21 628 So.2d 256, 259 (La. 1993). The duty is limited to properly
22 filling a prescription and warning of overdoses. See Guillory v.
23 Doctor X, 679 So.2d 1004, 1010 (La. Ct. App. 1996).

24 Louisiana courts recently have confirmed that this limit on
25 liability for prescriptions applies to contract theories as well
26 as tort causes of action. They have held that plaintiffs cannot

1 sue pharmacists for redhibition or breach of warranty. See
2 McKinney v. Warner Lambert, No. 01-1103 (E.D. La. May 15, 2001);
3 Williams v. Warner-Lambert Co., No. 01-0690 (W.D. La. July 27,
4 2001). For example, the Williams court denied remand and stated
5 that plaintiff had no possibility of recovery, because the
6 pharmacy submitted an affidavit confirming that the pharmacy had
7 no knowledge of the prescription's potential side effects.
8 Williams, No. 01-0690 (W.D. La. July 27, 2001). These decisions
9 are consistent with the uniform rule described above that a
10 pharmacy has no duty to warn.

11 The limitation on liability for pharmacies logically extends
12 to over-the-counter medications, for which pharmacies have even
13 less direct responsibility. For example, the court in Strickland
14 v. Brown Morris Pharmacy, 1996 WL 537736 (E.D. La. 1996), denied
15 remand in a suit against a pharmacy for the sale of Primatine
16 Mist, a non-prescription medication. The court cited La. Civ.
17 Code art. 2545, the redhibition statute regarding bad faith
18 sellers, and held that the plaintiff had no cause of action
19 against a pharmacy that sold the product in good faith. See also
20 Sharkey v. Sterling Drug, Inc., 600 So.2d 701, 715 (La. Ct. App.
21 1992) (upholding dismissal of redhibition claim against good
22 faith pharmacist who sold nonprescription aspirin); see also In
23 re Diet Drugs, 1998 WL 254976 (E.D. Pa. 1998) (denying remand
24 motion and finding fraudulent joinder of Louisiana pharmacies
25 accused of breach of warranty for good faith sales of nonpre-
26 scription diet drugs). Just as in these cases, K&B had no

ORDER

Page - 8 -

1 knowledge of potential dangers in the nonprescription medications
2 it sold, and plaintiff cannot pursue a cause of action against
3 the pharmacy.

4 Plaintiff argues that the over-the-counter cases sounded in
5 tort or alleged knowledge by the pharmacists. However, as
6 explained above, Louisiana courts have applied the limitation on
7 liability to contract claims in the prescription drug context.
8 The reasoning applies with even greater force for nonprescription
9 medication sold by innocent pharmacists, because the pharmacist
10 does not even have a duty to measure a nonprescription drug or
11 warn of possible overdose. As a result, plaintiff's cause of
12 action against K&B has no reasonable probability of success
13 whether couched as tort or redhibition.

14 B. Negligence

15 Plaintiff argues remand is necessary because the complaint
16 states a claim for negligence against K&B. To the contrary, as
17 explained above, K&B's status as a pharmacy prevents plaintiff
18 from alleging a tort cause of action based on defective medica-
19 tion. Even if K&B were not a pharmacist, plaintiff's complaint
20 still would fail. Any non-manufacturer seller of a product is

21

22 Plaintiff also relies on Badon v. RJR Nabisco, Inc., 236
23 F.3d 282 (5th Cir. 2000), in which the court granted remand in a
24 redhibition lawsuit that joined Louisiana pharmacies. Badon
25 provides little guidance, however, because it involved the
26 distribution of cigarettes rather than medication - prescripti
medications never became an issue. As described above, cour
since Badon have continued to limit the liability of pharma

ORDER

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CASE 2:02-cv-02436/P
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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 SEP 24 PM 3:36
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | | |
|--------------------------|---|--------------------------|
| DAPHINE DONNELLY, ET AL | * | CIVIL ACTION |
| | * | |
| VERSUS | * | NO 02-CV-02436 |
| | * | |
| BAYER CORPORATION, ET AL | * | JUDGE ENGELHARDT |
| | * | |
| * * * * * | * | MAGISTRATE JUDGE SHUSHAN |

**MEMORANDUM IN OPPOSITION TO NOVARTIS PHARMACEUTICALS
CORPORATION'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Daphine Donnelly and Jerome Donnelly (hereinafter referred to as "Plaintiffs"), who respectfully submit this Memorandum in Opposition to Novartis Pharmaceuticals Corporation's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted

Defendant has filed a Motion to Dismiss asserting that Plaintiffs' claims for fault, want of care, negligence, gross negligence, strict liability, intentional and willful conspiracy, and breach of warranty against redhibitory defects or vices should be dismissed. Defendant asserts that the Louisiana Products Liability Act (Louisiana Revised Statute 9:2800.54 et seq., hereinafter referred to as "LPLA") establishes the exclusive theories of recovery against a manufacturer in a personal injury action and does not provide for recovery based on the aforementioned claims. For the following

Fee _____
Process _____
X Dkt'd _____
CtRmDep _____
Doc. No. _____

reasons, Novartis Pharmaceuticals Corporation's Motion to Dismiss should be denied

1 Background

Plaintiffs filed this suit in the 34th Judicial District Court against Bayer Corporation, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc , 4Life Research, Successor by merger to Shaperite, Smoothie King Co , Inc , Smoothie King Systems, Inc , and Walgreen Louisiana Co , Inc , d/b/a "Walgreens" for marketing, selling, distributing, and/or manufacturing Shaperite, Alka Seltzer Plus and Tavist-D, all PPA-containing products

Plaintiffs claim in the Petition for Damages that the Defendant, directly or indirectly, manufactured and sold medications that contained Phenylpropanolamine ("PPA") to Plaintiff, Daphne Donnelly (Petition ¶ 8-12) Plaintiffs allege that Defendant knew or should have known about medical research and publications associating PPA with serious health risks (Petition ¶ 6-7) Defendant (Bayer) failed to provide warnings of these side-effects and risks associated with the use of PPA-containing medications (Petition ¶ 15) Plaintiffs have averred that defendant was aware of these risks associated with PPA and concealed its knowledge of the risks from Plaintiff and consumers (Petition ¶ 16) As a result of ingesting the PPA-containing medication, Plaintiff, Daphne Donnelly, suffered a stroke on or about January 1991 which resulted in, but not limited to, paralysis of the right side of the body (Petition ¶ 10)

2 Argument

1 Applicable Standard

In evaluating a Motion to Dismiss filed under F R C P , 12(b)(6), the moving party bears the burden of showing that the plaintiff can prove no set of facts consistent with the allegations in the Petition for Damages which would entitle it to relief *Baton Rouge Building and Construction*

Trades Council, AFL-CIO v Jacobs Constructors, Inc , 804 F 2d 879 (5th Cir , 1986) In addition, the reviewing Court “must accept as true well-plead averments and view then in light most favorable to the plaintiff” *American Waste and Pollution Control Co v Browning-Ferris, Inc* , 949 F 2d 1384, 1386 (5th Cir 1991)

2 Plaintiff Has Asserted Viable Claims for Compensatory Damages Under Louisiana Law

Plaintiffs have asserted allegations under the LPLA, which admittedly controls the claims set forth by the Plaintiffs Under the LPLA, Plaintiffs can prove a product is “unreasonably dangerous or defective (1) in construction or composition, (2) in design, (3) because of inadequate warning, or (4) because of nonconformity to an express warranty ” La R S 9 2800 54 *et seq*

Nonetheless, plaintiffs’ allegations regarding fault, want of care, negligence, gross negligence, strict liability, intentional and willful conspiracy, and breach of warranty against redhibitory defects or vices relating to non-economic damages can still support Plaintiff’s LPLA claims and breach of warranty against redhibitory defects relating to economic damages In *Busse, et al v Bayerische Motoren Werke, A G , et al* , 1996 WL 732837 (E D La 1996), the plaintiff alleged claims for negligence, redhibition and products liability claims against a product manufacturer Similar to the instant matter, the defendant in *Busse* moved for summary judgment as to claims by the plaintiff not cognizable under the LPLA The Court denied the motion stating that the allegations of negligence supported plaintiff’s claim for relief under the LPLA *Id*

This is consistent as the theories articulated under the LPLA “are predicated on principles of strict liability, negligence, or warranty, respectively ” *Jefferson v Lead Industries Assoc , Inc et al* , 106 F 3d 1245, 1251 (5th Cir 1997) Therefore, the allegations set forth in plaintiff’s Petition for

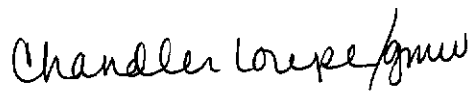
Damages relating to fault, want of care, negligence, gross negligence, strict liability, intentional and willful conspiracy, and breach of warranty against redhibitory defects or vices should not be dismissed as they further strengthen Plaintiff's other claims

Nor should Plaintiffs' redhibition claims be dismissed. Redhibition is a viable means to recover pecuniary losses from the manufacturer. In fact, the court in *Masculin, et al v Grinnell Corp, et al*, 2001 WL 8584 (E D La 2001) ruled that the LPLA does not preclude recovery under redhibition for losses arising from breach of warranty. Therefore, the allegations and causes of actions set forth in the Petition for Damages relating to breach of warranty should not be dismissed (Petition ¶¶ 13-16)

3 Conclusion

For the foregoing reasons, Plaintiffs pray that Novartis Pharmaceuticals Corporation's Motion to Dismiss be denied

Respectfully submitted,

By 
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713/425-5355 (Facsimile)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 24th day of Sept, 2002

Chandler Loupe /gmw
J. Chandler Loupe



CASE: 2:02-cv-02436/P
DOCUMENT: 22
DATE: 09/24/02
CLERK: tbl

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 SEP 24 PM 3:36

LORETTA G. WRYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|--------------------------|---|--------------------------|
| DAPHINE DONNELLY, ET AL | * | CIVIL ACTION |
| | * | |
| VERSUS | * | NO 02-CV-02436 |
| | * | |
| BAYER CORPORATION, ET AL | * | JUDGE ENGELHARDT |
| | * | |
| * * * * * | | MAGISTRATE JUDGE SHUSHAN |

**MEMORANDUM IN OPPOSITION TO NOVARTIS CONSUMER HEALTH, INC.'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Daphine Donnelly and Jerome Donnelly (hereinafter referred to as "Plaintiffs"), who respectfully submit this Memorandum in Opposition to Novartis Consumer Health, Inc 's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted

Defendant has filed a Motion to Dismiss asserting that Plaintiffs' claims for fault, want of care, negligence, gross negligence, strict liability, intentional and willful conspiracy, and breach of warranty against redhibitory defects or vices should be dismissed Defendant asserts that the Louisiana Products Liability Act (Louisiana Revised Statute 9 2800 54 et seq , hereinafter referred to as "LPLA") establishes the exclusive theories of recovery against a manufacturer in a personal injury action and does not provide for recovery based on the aforementioned claims For the following

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reasons, Novartis Pharmaceuticals Corporation's Motion to Dismiss should be denied

1 Background

Plaintiffs filed this suit in the 34th Judicial District Court against Bayer Corporation, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc , 4Life Research, Successor by merger to Shaperite, Smoothie King Co , Inc , Smoothie King Systems, Inc , and Walgreen Louisiana Co , Inc , d/b/a "Walgreens" for marketing, selling, distributing, and/or manufacturing Shaperite, Alka Seltzer Plus and Tavist-D, all PPA-containing products

Plaintiffs claim in the Petition for Damages that the Defendant, directly or indirectly, manufactured and sold medications that contained Phenylpropanolamine ("PPA") to Plaintiff, Daphne Donnelly (Petition ¶ 8-12) Plaintiffs allege that Defendant knew or should have known about medical research and publications associating PPA with serious health risks (Petition ¶ 6-7) Defendant (Bayer) failed to provide warnings of these side-effects and risks associated with the use of PPA-containing medications (Petition ¶ 15) Plaintiffs have averred that defendant was aware of these risks associated with PPA and concealed its knowledge of the risks from Plaintiff and consumers (Petition ¶ 16) As a result of ingesting the PPA-containing medication, Plaintiff, Daphne Donnelly, suffered a stroke on or about January 1991 which resulted in, but not limited to, paralysis of the right side of the body (Petition ¶ 10)

2 Argument

1 Applicable Standard

In evaluating a Motion to Dismiss filed under F R C P , 12(b)(6), the moving party bears the burden of showing that the plaintiff can prove no set of facts consistent with the allegations in the Petition for Damages which would entitle it to relief *Baton Rouge Building and Construction*

Trades Council, AFL-CIO v Jacobs Constructors, Inc , 804 F 2d 879 (5th Cir , 1986) In addition, the reviewing Court “must accept as true well-plead averments and view then in light most favorable to the plaintiff” *American Waste and Pollution Control Co v Browning-Ferris, Inc* , 949 F 2d 1384, 1386 (5th Cir 1991)

2 Plaintiff Has Asserted Viable Claims for Compensatory Damages Under Louisiana Law

Plaintiffs have asserted allegations under the LPLA, which admittedly controls the claims set forth by the plaintiff Under the LPLA, Plaintiffs can prove a product is “unreasonably dangerous or defective (1) in construction or composition, (2) in design, (3) because of inadequate warning, or (4) because of nonconformity to an express warranty ” La R S 9 2800 54 *et seq*

Nonetheless, Plaintiffs’ allegations regarding fault, want of care, negligence, gross negligence, strict liability, intentional and willful conspiracy, and breach of warranty against redhibitory defects or vices relating to non-economic damages can still support Plaintiff’s LPLA claims and breach of warranty against redhibitory defects relating to economic damages In *Busse, et al v Bayerische Motoren Werke, A G , et al* , 1996 WL 732837 (E D La 1996), the plaintiff alleged claims for negligence, redhibition and products liability claims against a product manufacturer Similar to the instant matter, the defendant in *Busse* moved for summary judgment as to claims by the plaintiff not cognizable under the LPLA The Court denied the motion stating that the allegations of negligence supported plaintiff’s claim for relief under the LPLA *Id*

This is consistent as the theories articulated under the LPLA “are predicated on principles of strict liability, negligence, or warranty, respectively ” *Jefferson v Lead Industries Assoc , Inc et al* , 106 F 3d 1245, 1251 (5th Cir 1997) Therefore, the allegations set forth in plaintiff’s Petition for

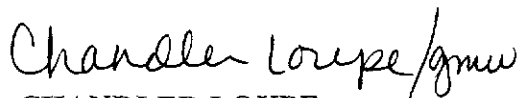
Damages relating to fault, want of care, negligence, gross negligence, strict liability, intentional and willful conspiracy, and breach of warranty against redhibitory defects or vices should not be dismissed as they further strengthen Plaintiff's other claims

Nor should Plaintiffs' redhibition claims be dismissed. Redhibition is a viable means to recover pecuniary losses from the manufacturer. In fact, the court in *Masculin, et al v Grinnell Corp, et al*, 2001 WL 8584 (E D La 2001) ruled that the LPLA does not preclude recovery under redhibition for losses arising from breach of warranty. Therefore, the allegations and causes of actions set forth in the Petition for Damages relating to breach of warranty should not be dismissed (Petition ¶¶ 13-16)

3 Conclusion

For the foregoing reasons, Plaintiffs pray that Novartis Pharmaceuticals Corporation's Motion to Dismiss be denied

Respectfully submitted,

By 

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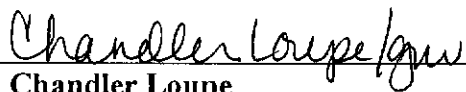
713/425-5355 (Facsimile)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 24th day of Sept, 2002



J. Chandler Loupe



CASE: 2:02-cv-02436/P
DOCUMENT: 21
DATE: 09/24/02
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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORLITA G. WYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE DONNELLY, ET AL

*

CIVIL ACTION

*

VERSUS

*

NO 02-CV-02436

*

BAYER CORPORATION, ET AL

*

JUDGE ENGELHARDT

*

* * * * *

MAGISTRATE JUDGE SHUSHAN

**RESPONSE IN OPPOSITION TO NOVARTIS PHARMACEUTICALS
CORPORATION'S MOTION FOR TEMPORARY STAY**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Daphine Donnelly and Jerome Donnelly (hereinafter referred to as "Plaintiffs"), who respectfully submit this Response in Opposition to Novartis Pharmaceuticals Corporation's Motion For Temporary Stay of Proceedings

1 Background

Plaintiffs filed this suit in the 34th Judicial District Court against Bayer Corporation, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc , 4Life Research, Successor by merger to Shaperite, Smoothie King Co , Inc , Smoothie King Systems, Inc , and Walgreen Louisiana Co , Inc , d/b/a "Walgreens" for marketing, selling, distributing, and/or manufacturing Shaperite, Alka Seltzer Plus and Tavist-D, all PPA-containing products

Defendants, Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc filed a Notice of Removal on August 7th, 2002, and subsequently a Motion to Dismiss for Failure to State a Claim Upon which Relief Can Be Granted on September 6, 2002 Thereafter, Plaintiffs have filed a

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Motion to Remand, Response in Opposition to Defendants' Motions to Dismiss for Failure to State a Claim Upon which Relief Can Be Granted and now file this Response in Opposition to Defendant's Motion to Temporary Stay. Plaintiffs respectfully request that this Court to rule on Plaintiff's Motion to Remand and Response to Defendant's Motion for Dismissal, thus, denying Defendant's Motion to Temporary Stay.

2 Argument

The case subject to this Response in Opposition to Defendant's Motion was improvidently removed to Federal Court by the manufacturer Defendants of products which contained Phenylpropanolamine (hereinafter "PPA"). Plaintiffs have responded by filing a Motion to Remand and seek to have the Court rule on this Motion before the case is transferred to the Judicial Panel on Multidistrict Litigation (hereinafter "MDL Panel"). Because the Louisiana Federal Courts lack jurisdiction over the matter, it would be a waste of judicial resources and economy for the MDL Panel to allow the Western District of Washington to preside over the case that belongs in state court. Moreover, Louisiana Federal Courts are well-versed in matters pertaining to Louisiana law and therefore is the forum of choice to decide the issue of remand. As such, Defendant's Motion to Temporary Stay should be denied and this court should rule on Plaintiff's Motion to Remand.

This issue is not a novel theory, although not binding to this Court, Judge Lemelle, sitting in the Eastern District of Louisiana, has previously denied such a motion. In that case, even when a Conditional Transfer Order to the MDL Panel had been filed, Judge Lemelle denied the Motion to Stay, citing Rule 15 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, finding that the District Court of Louisiana retained jurisdiction to hear all such matters before the case is officially transferred to the MDL Panel pursuant to the rule. (See Andry, et al v American Home Products Corporation, et al, No. 02-0173 (Lemelle, J., E.D. La. February 8, 2002) (Exhibit A

hereto) Although a Conditional Transfer Order has been filed in this matter, Plaintiffs have opposed such transfer. This Court retains the authority and jurisdiction to deny the Motion to Stay and rule on other matters currently pending before the Court.

3 Conclusion

For the foregoing reasons, Plaintiffs pray that Novartis Pharmaceuticals Corporation's Motion to Temporary Stay be denied.

Respectfully submitted,

By *Chandler Loupe/gmw*

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 24th day of Sept, 2002

Chandler Loupe/gmw
J. Chandler Loupe

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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CLERK G. WYTHE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KATHLEEN ANDRY, ET AL

*

CIVIL ACTION

NO. 02-CV-0173

*

*

SECTION "B"

AMERICAN HOME PRODUCTS
CORPORATION, ET AL

*

*

MAGISTRATE

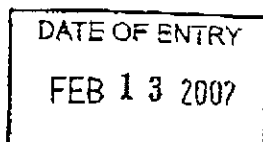
JOINT MOTION TO STAY PROCEEDINGS

MAY IT PLEASE THE COURT:

The above matter is one of several hundred actions, which has been requested to be a "tag-along" action pursuant to MDL-1407 - in re Phenylpropanolamine (PPA) Products Liability Litigation.

As plaintiffs' counsel will not file any objections and/or oppose the tag-along procedures, the MDL Panel will designate the above matter as a tag-along action, and stay the above proceedings.

'Plaintiffs' and defense counsel seek to stay the above proceedings, pending this decision from the MDL Panel, as it would serve both parties and this Honorable Court to delay any action



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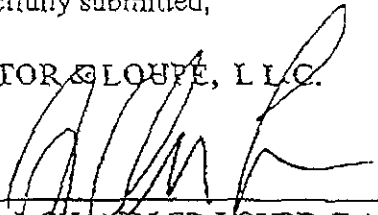


on the above matter, which will be transferred to another jurisdiction in a matter of days, based upon other actions already transferred. As such, the stay will save Judicial Resources, and the parties' time and expenses in responding to said motions.

Respectfully submitted,

CLAITOR & LOUPE, L.L.C.

By:


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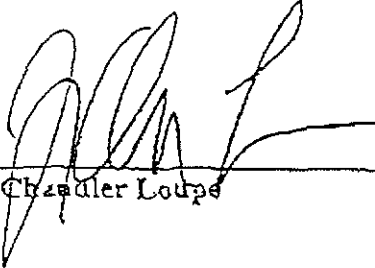
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 6th day of February, 2002.



J. Chandler Loupe

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KATHLEEN ANDRY, ET AL * CIVIL ACTION
* NO. 02-CV-0173
v. *
* SECTION "B"
AMERICAN HOME PRODUCTS *
CORPORATION, ET AL * MAGISTRATE
*

ORDER

DENIED
Pursuant to Rule 15 of the Federal Rules of Civil Procedure
of the Eastern District of Louisiana
Panel on Multi-District Litigation
Considering the above and foregoing Joint Motion to Stay Proceedings,
IT IS ORDERED that the above proceedings be Stayed pending a decision of the Judicial
Panel on Multi-District Litigation on whether to Stay and Transfer said action
New Orleans, Louisiana this _____ day of _____, 2002
2/8/02

JUDGE



CASE: 2:02-cv-02436/P
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DATE: 09/24/02
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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 SEP 13 AM 11:10
LORETTA G. WHYTE
CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DAPHINE B DONNELLY, ET AL

CIVIL ACTION

NO 02-cv-2436

V

JUDGE ENGELHARDT

BAYER CORPORATION, ET AL

MAGISTRATE SHUSHAN

**NOVARTIS CONSUMER HEALTH, INC.'S
MOTION FOR TEMPORARY STAY**

NOW INTO COURT, through undersigned counsel, comes defendant, Novartis Consumer Health, Inc , and for reasons detailed in the attached memorandum in support, moves this Court for a temporary stay of all proceedings in this matter pending a final ruling of the Judicial Panel on Multidistrict Litigation on transfer of this case to Multidistrict Litigation, *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 173 F. Supp 2d 1377 (J P M L 2001)

Respectfully submitted,

BY: 

Sessions Fishman & Nathan L.L.P.

Joy Goldberg Braun (#3416) T A

Eric R Nowak (#27025)

Shirin E Harrell (#27495)

201 St Charles Avenue, Suite 3500

New Orleans, LA 70170-3500

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and

7/10/02
19

Randolph S. Sherman
Lori B. Leskin
Danielle E. Finck
Kaye Scholer LLP
425 Park Avenue
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Attorneys for Defendant
NOVARTIS CONSUMER HEALTH, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13TH day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding by ___ hand delivery, ☒ U.S. mail or _____ facsimile transmission



ERIC R. NOWAK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

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|-----------------------------|--------------------|
| DAPHINE B. DONNELLY, ET AL. | CIVIL ACTION |
| | NO 02-cv-2436 |
| V | |
| | JUDGE ENGELHARDT |
| BAYER CORPORATION, ET AL | MAGISTRATE SHUSHAN |

**MEMORANDUM IN SUPPORT OF NOVARTIS CONSUMER HEALTH, INC.'S
MOTION FOR TEMPORARY STAY**

Background

This is a product liability action alleging personal injury from the use of over-the-counter medications containing phenylpropanolamine (PPA). The plaintiff filed the instant action in the Thirty-Fourth Judicial District Court for the Parish of St. Bernard in July 2002. The defendants removed this action to the federal district court in Louisiana.

On August 28, 2001, the Judicial Panel on Multidistrict Litigation (the "Panel") issued a transfer order, pursuant to 28 U.S.C. § 1407, centralizing 14 similar PPA actions in the Western District of Washington. See *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 173 F. Supp. 2d 1377 (J.P.M.L. 2001). According to the Panel, centralization of the cases, which all involved "complex core questions regarding the safety of PPA," was necessary "in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings and conserve the resources of the parties, their counsel and the judiciary." *Id.* The Panel reached this conclusion despite "differences among

the actions in terms of named defendants, specific products involved, legal theories of recovery, status as class actions, and/or types of injury alleged.” *Id* According to the Panel, consolidation would best “promote the just and efficient conduct of the litigation” without causing inconvenience to the parties *Id*

Similar cases pending in Louisiana federal district courts were treated as potential tag-along actions.¹ To date, the Panel has issued twenty-one Transfer Orders conditionally transferring over 350 PPA cases to the Western District of Washington.² Most of these conditional transfer orders have become final

Many of the cases pending in this District have already been transferred, or are in the process of being transferred, to the MDL court for further proceedings. As discussed later in this memorandum, most of the courts addressing the issues (including this Court)³ have stayed those cases pending a final determination by the Panel on transfer. Likewise, a temporary stay in the proceedings in this case, pending a final ruling by the Panel regarding transfer of the case to the MDL, will promote judicial efficiency, consistency in pre-trial rulings and convenience to the parties and witnesses

¹ A “tag-along action” means “a civil action pending in a district court and involving common question of fact with actions previously transferred under Section 1407.” R.P.J.P.M.L. 11

² “Upon learning of the pendency of a potential “tag-along action,” an order may be entered by the Clerk of the Panel transferring that action to the previously designated transferee district court on the basis of the prior hearing and for the reasons expressed in previous opinions and orders of Panel in the litigation.” R.P.J.P.M.L. 74(a)

³ *Ohllia v. Novartis Pharmaceuticals Corp.*, No. 02-724

1. A Stay Furthers the Goals of Judicial Efficiency and Consistency

This Court's authority to stay proceedings is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants."⁴ Thus, while the decision to grant a stay is discretionary, "it is appropriate when it serves the interest of judicial economy and efficiency."⁵ As explained by the Northern District of Illinois, a stay, although not required, promotes efficiency and consistency even when the jurisdiction is questioned

Sending these cases to the MDL is not mandatory. But the benefits of transferring them to the MDL—the body established by Congress specifically to ameliorate the duplicative litigation and the valuable waste of judicial resources—are obvious. Once transferred, the jurisdictional objections can be heard and resolved by a single court. The rewards of this approach are consistency and economy.⁶

Even when jurisdictional issues have been raised, transfer to the MDL is appropriate.⁷ A stay promotes judicial efficiency because it prevents duplication of effort by the court if a case is later transferred to an MDL. If no stay is granted, and the case is later transferred to an MDL, the transferor court will have "needlessly expended its energies familiarizing itself with the intricacies of a case that would be heard by another judge [and] any efforts on behalf of.. [the transferor] court concerning case management will most likely have to be replicated by the judge that is assigned to handle the consolidated litigation..⁸ According to *Rivers*, "a majority of courts have concluded that

⁴ *Landis v North American Co*, 299 U S 248, 254, 57 S Ct 163, 166, 81, L Ed 153 (1936)

⁵ *Rivers v Walt Disney Company*, 980 F Supp 1358, 1360 (C D Cal 1997)

⁶ *Johnson v AMR Corp*, 1996 WL 164415 (N D Ill, 1996) at *3

⁷ *Id*

⁸ *Rivers*, 980 at 1360-1361

it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the MDL Panel because of the judicial resources that are conserved”⁹

In the Eastern District of Louisiana, Judges Beer, Duval, Engelhardt, Fallon, Feldman, McNamara, Porteous and Vance have issued stay orders citing judicial efficiency and consistency in pre-trial rulings.¹⁰ Judges in the Middle District of Louisiana have also stayed several PPA cases pending the Panel’s final determination on transfer.¹¹ Judge Polozola’s stay was in a PPA case where a motion to remand was at issue pending a transfer decision by the MDL. Likewise, Judges Doherty and James and Magistrate Judges Payne and Kirk of the Western District of Louisiana all have recognized that judicial efficiency is best served by a stay of similarly situated PPA cases pending the Panel’s final order on transfer. On or about November 14, 2001, Magistrate Judge Payne entered a stay order in over forty PPA cases pending in the Western District.¹²

⁹ *Id.* at 1362

¹⁰ *Peterson v. Bayer Corp.*, et al, No. 01-3467, *Dyson v. American Home Products Corp.*, et al, No. 01-3548, *Craft v. Whitehall-Robins Health Care*, et al, No. 01-3490, *Doreen Martin v. Bayer Corp.*, et al, No. 013477, *Garrison v. American Home Products*, et al, No. 01-3484, *Garcia v. SmithKline Beecham Corp.*, et al, No. 01-3448, *Favorite v. Bayer Corp.*, et al, No. 01-3478, *Mercier v. Ciolino Pharmacy*, et al, No. 02-0413

¹¹ *Fortenberry v. American Home Products Corp.*, et al, No. 02-145, *Beals v. American Home Products Corp.*, et al, No. 02-148-D; *Williams v. Bayer Corp.*, et al, No. 02-214

¹²(1) *Barbara Evans*, v *Bayer Corp.*, No. 01-CV1486, (2) *Malvine Moore*, v *Bayer Corp.*, No. 01-CV1487, (3) *Samuels*, v *Bayer Corp.*, No. 01-CV1488, (4) *Dianne Thomas*, v *Bayer Corp.*, No. 01-CV1489, (5) *Bobby Holmes*, v *Bayer Corp.*, No. 01-CV1490, (6) *James L. Hill, Jr.*, v *Bayer Corp.*, No. 01-CV1499, (7) *Lorenzo Maiden*, v *Bayer Corp.*, No. 01-CV1500, (8) *Rambo* v *Bayer Corp.*, No. 01-CV1626; (9) *Ivory O’Neal* v *Bayer Corp.*, No. 01-CV1627, (10) *Silas D. Whitaker* v *Bayer Corp.*, No. 01-CV1628, (11) *Jerry Bowman* v *Bayer Corp.*, No. 01-CV1629, (12) *Sam Baker* v *Bayer Corp.*, No. 01-CV1630, (13) *Demetria Speed* v *Bayer Corp.*, No. 01-CV1631, (14) *Demetris Calhoun* v *Bayer Corp.*, No. 01-CV1632, (15) *Allen Ray Bolden* v *Bayer Corp.*, No. 01-CV1634, (16) *Floyd Waters, Jr.* v *Bayer Corp.*, No. 01-CV1819, (17) *Joe Moore* v *Bayer Corp.*, No. 01-CV1801, (18) *Mary Jean Walker* v *Bayer Corp.*, No. 01-CV1818, (19) *Pinkie Ruffen* v *Bayer Corp.*, No. 01-CV-1744, (20) *Horace Douglas* v *Bayer Corp.*, No. 01-CV1742, (21) *Charlie Jackson* v *Bayer Corp.*, No. 01-CV1697, (22) *Bernard James* v *Bayer Corp.*, No. 01-CV1696, (23) *W T King* v *Bayer Corp.*, No. 01-CV1745, (24) *Clyde Metcalf* v *Bayer Corp.*, No. 01-CV1694, (25) *Gloria Thompson* v *Bayer Corp.*, No. 01-CV1698, (26) *Essie Mae Turner* v *Bayer Corp.*, No. 01-CV1739, (27) *Dwight Wiley* v *Bayer Corp.*, No. 01-CV1660, (28) *Louis Wright* v *Bayer Corp.*, No. 01-CV1695, (29) *Willie Lee Young* v *Bayer Corp.*, No. 01-CV1743, (30) *Perry Hill* v *Bayer Corp.*, No. 01-CV1741, (31) *Mozetta Johnson* v *Bayer Corp.*, No. 01-CV1746, (32) *Ardis McCall* v *Bayer Corp.*, No. 01-

In *James Bowman v Bayer Corp, et al*, No 01-1802-A, Magistrate Judge Kirk recommended a stay pending the Panel's final determination on transfer because:

. .it makes no sense for this court to decide the remand issue in each of the cases now pending before it and for myriad other federal courts across the land to be required to study the record, research the law and write opinions on the identical issue. In other words, judicial economy is a strong factor in this case in favor of a stay. (See Magistrate Judge Kirk's Report at 5, attached as Exhibit A)

Judge James adopted Magistrate Kirk's recommendation in *Tamika McFee v Bayer Corp, et al*, No 01-1820-M and entered judgment staying that case "pending final determination by the Panel on Multidistrict Litigation as to whether a final order of transfer will be entered in this case "(See Exhibit B).

In addition to judicial economy, Magistrate Judge Kirk's report identifies the risk of inconsistent pretrial rulings as another factor in support of a stay (See Magistrate Kirk's Report in *Bowman* at 4, attached as Exhibit A) The jurisdictional objections at issue in this case are common

CV1740, (33) *R L George v Bayer Corp*, No 01-CV1922, (34) *Betty Clinton v Bayer Corp*, No 01-CV-1943, (35) *Jessie Foster v Bayer Corp*, No 01-CV-1940, (36) *James Jones v Bayer Corp*, No 01-CV-1941, (37) *Rufus James Hampton v Bayer Corp*, No 01-CV-1945, (38) *Fred Ashley v Bayer Corp*, No 01-CV-1942, (39) *James Perkins v Bayer Corp*, No 01-CV-1946, (40) *Joe Johnson, Jr v Bayer Corp*, No 01-CV-1944, (41) *Abon Claville v Bayer Corp*, No 01-CV-1896, (42) *Michael Johnson v Bayer Corp*, No 01-CV-1895, and (43) *Mickey Lathon v Bayer Corp*, No 01-CV-1984
Bayer Corporation, et al, No 01-CV-1984

to numerous other PPA cases. Thus, as Magistrate Kirk notes in his report,

[a]lthough plaintiff argues that a Louisiana court can best decide issues of Louisiana law concerning the viability of the state law claims against defendant K&B, the fact is that there is a significant risk of inconsistent rulings in this and all other cases now pending in which the fraudulent joinder issues exists...A uniform decision with regard to those issues in all such cases can best be made by the transferee court, not by this court (See Magistrate Kirk's report in *Bowman* at 4)

See also *Ivy v Diamond Shamrock Chem Co*, 901 F 2d 7, 9 (2d Cir. 1990) (affirming Panel's rejection of plaintiffs' request that remand motion be decided by transferor court, holding that "[t]he jurisdictional issue in question is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation." and that "[c]onsistency as well as economy is thus served" if "the jurisdictional objections . . . [are] heard and resolved by a single court")

Indeed, inconsistency already exists in Louisiana where remand has been adjudicated. Judge Rothstein has denied remand in several cases,¹³ while Judges Lemelle, Lemmon, and Barbier have come to different legal conclusions in their orders to remand based on substantially similar PPA cases.¹⁴

¹³ Judge Rothstein, in the ongoing MDL proceeding, has denied remand motions in numerous similar cases involving Louisiana law. See *Perksin v Bayer Corp*, et al, No C01-2023R, *Claville v Bayer Corp*, et al, No C01-2015R, *Lathon v Bayer Corp*, et al, No C01-2013R, *Ashley v Bayer Corp*, et al, No C01-2019R, *Monk v Bayer Corp*, et al, No C01-1793R, *Hampton v Bayer Corp*, et al, No C01-2022R, *Johnson v Bayer Corp*, et al, No C01-2021R, *O'Neal v Bayer Corp*, et al, No C01-2011R, *Whitaker v Bayer Corp*, et al, No C01-2012R, *Johnson v Bayer Corp*, et al, No C01-2014R, *Gray v Bayer Corp*, et al, No C01-1796R, *Moore v Bayer Corp*, et al, No C01-2051R, *Bowman v Bayer Corp*, et al, No C01-1868R, *Clinton v Bayer Corp*, et al, No C01-2020R, *Foster v Bayer Corp*, et al, No C01-2017R, *George v Bayer Corp*, et al, No C01-2016R, *Rambo v Bayer Corp*, et al, No C01-2010R, *McFee v Bayer Corp*, et al, No C01-1859R, *Walker v Bayer Corp*, et al, No C01-2053R, *Delaney v Bayer Corp*, et al, No C01-2052R, *Bolden v Bayer Corp*, et al, No C01-2070R, *Bowman v Bayer Corp*, et al, No C01-2064R, *Waters v Bayer Corp*, et al, No C01-2054R, *Speed v Bayer Corp*, et al, No C01-2067R, *Calhoun v Bayer Corp*, et al, No C01-2068R, and *Baker v Bayer Corp*, et al, No C01-2065R.

¹⁴ *Mosley v Bayer Corporation* No 01-3479 E D La U S D C, *St Amand v Bayer Corp*, No 01-3421 E D La U S D C, *Bardales v Whitehall-Robins* No 01-3487 E D La U S D C, and *Coleman v Bayer Corp*, No 02-333 E D La U S D C.

A stay is also appropriate because it is very likely that this case will ultimately be transferred to MDL-1407. A tag-along action is transferred to an existing MDL if it shares common issues of fact with the MDL cases, promotes the convenience of parties and witnesses, and advances the just and efficient conduct of the actions.¹⁵ Plaintiff's PPA claims and allegations involve numerous common issues of fact with the cases already part of the MDL. As Magistrate Kirk recognized in *Bowman* and *McFee* transfer "appears likely." (See Exhibit A at 6.)

2. A Stay Does Not Unduly Prejudice the Plaintiff

A temporary stay will not unduly prejudice the plaintiff.¹⁶ If the plaintiff timely opposes transfer, the Panel will address plaintiff's objections at its next appropriate session.¹⁷ The delay will likely be brief and does not warrant denying defendants their requested stay. See e.g., *American Seafood, Inc v Magnolia Processing*, 1992 WL 102762 (E.D. Pa. May 7, 1992) at *1 (granting motion to stay pending ruling by Panel, and noting that "[the] plaintiffs will not be substantially prejudiced by staying this action pending the decision of the JPML. The stay which the court orders will only be in effect until the JPML issues its decision.")

Moreover, any potential prejudice from a short delay is far outweighed by the benefits of a stay--preventing inconsistent results and promoting judicial efficiency. A stay would be limited to the brief period pending a transfer decision by the Panel. If the Panel decides on consolidation

¹⁵ See *In re Stirling Homex Corp. Sec. Litig.*, 442 F. Supp. 547, 549 (J.P.M.L. 1977), *In re Equity Funding Corp. of Am. Sec. Litig.*, 397 F. Supp. 884-85 (J.P.M.L. 1975).

¹⁶ In fact, in similar PPA cases, plaintiff's counsel has recognized the benefits of a temporary stay to both the court and parties and has moved the court to stay the PPA action. *Ashley v. American Home Products*, USDC W.D. La. No. 02-239.

¹⁷ R.P.J.P.M.L. 74 (d).

in MDL-1407, the plaintiff may then proceed in the Western District of Washington; if transfer is denied, plaintiff then proceeds in this Court

Under these circumstances, the benefits of a temporary stay are outweighed by any potential prejudice to the plaintiff. *See Egon v Del-Val-Financial Corp.*, 1991 WL 13726 (D N J.) at *1 (“even if a temporary stay can be characterized as a delay prejudicial to plaintiffs, there are considerations of judicial economy and hardship to defendants that are compelling enough to warrant such a delay”). *See also Weinke v Microsoft Corp.*, 84 F Supp 2d 989,990 (W.D. Wis 2000) (rejecting plaintiff’s assertions that a stay pending resolution of transfer issues would result in a “prolonged delay” and holding that plaintiff’s cursory assertions of prejudice do not outweigh the disadvantages of litigating identical claims in a multitude of venues. “[and] in light of the pending MDL ruling on transfer this action should be stayed in the interest of judicial economy and to avoid inconsistent results”).

In contrast, Novartis Consumer Health, Inc and the other defendants will be substantially prejudiced if the Court denies the stay. A temporary stay will prevent the defendants from unnecessarily incurring expenses in duplicative pretrial proceedings. As Magistrate Judge Kirk noted in *Bowman* “it would be manifestly unfair to require these defendants, which have been named as defendants in dozens of other similar cases, to defend each of those cases independently” (see Exhibit A at 5). The potential for duplicative pretrial motions and jurisdictional objections represents the sort of “hardship and inequity” that courts consider when deciding a motion to stay. *See Aikens v Microsoft Corp.*, 2000 WL 310391 at *2 (E D La March 24, 2000) (finding a stay was appropriate to avoid “considerable hardship and inequity” to a defendant faced with multiple suits,

many with similar jurisdictional objections, in multiple courts) It is precisely this sort of duplicative pretrial activity that the MDL proceeding is designed to prevent

Conclusion

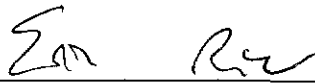
For the foregoing reasons, this Court should grant Novartis Consumer Health, Inc.'s Motion for Temporary Stay pending a final ruling of the Judicial Panel on Multidistrict Litigation on transfer of the case to MDL Docket No 1407 and stay all pretrial proceedings, including, but not limited to, a stay of all hearings, disclosure, and deadlines established by the Federal Rules of Civil Procedure and Local Rules of this Court.

Respectfully submitted,

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Attorneys for Defendant
NOVARTIS CONSUMER HEALTH, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding by ___ hand delivery, ✓ U S mail or _____ facsimile transmission



Eric R Nowak

S/...

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHELWELL, CLERK
DATE 10/19/01
BY Tw

JAMES BOWMAN CIVIL ACTION NO. 01-1802-A
VERSUS U.S. DISTRICT JUDGE TOM STAGG
BAYER CORPORATION, et al U.S. MAGISTRATE JUDGE JAMES D. KIRK

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the court is plaintiff's motion to remand [Doc. #13] and motions for stay of proceedings [Doc. #21, #27] filed on behalf of defendants Bayer Corporation ("Bayer") and American Home Products Corporation ("American"). The motions have been referred to the undersigned for decision and report and recommendation, respectively¹.

Plaintiff sued defendants for damages claimed as the result of the ingestion of phenylpropanolamine ("PPA"). Defendants Bayer and American are diverse defendants. However, K&B Corporation ("K&B") is a Louisiana corporation, the addition of which, if not fraudulently joined, destroys diversity. Defendants argue that K&B was fraudulently joined for the purpose of preventing jurisdiction in this court.

¹ Similar motions are pending before me in Henry Monk v. Bayer Corporation, et al, #01-1760-A and Tamika McFee v. Bayer Corporation, et al, #01-1820-M, Western District of Louisiana, Report and Recommendations on which are issued contemporaneously this date.

(31)



Plaintiff argues that the allegations contained in the complaint against K&B are based on Louisiana's law of redhibition, acknowledging that under Louisiana law a non-manufacturing seller of an allegedly defective product is not liable in tort, absent a showing that it knew or should have known that the product was defective and failed to declare it. Wilson v. State Farm Fire & Cas. Ins. Co., 94-1342 (La.App.3 Cir. 4/5/95), 654 So.2d 385, reh'g. den., writ. den., 95,1704 (La. 10/6/95), 661 So.2d 476. Here, plaintiff does not allege that K&B knew or should have known the product was defective, but alleges only that as a retail seller it is liable in redhibition for a product proven to be defective. Defendants argue that plaintiff's allegations in the complaint are inadequate to support a cause of action for redhibition.

In addition to opposing the motion to remand, defendants have asked this court to stay the entire proceeding, including the pending ruling on the plaintiff's motion to remand, until a determination can be made as to whether this case will be transferred pursuant to order of the Judicial Panel on Multi-district Litigation. Defendants point out that there are numerous cases in this district, as well as other district courts in Louisiana and in many other states, alleging damages as a result of the ingestion of PPA.

On August 28, 2001, the Panel transferred eight civil actions to the U.S. District Court for the Western District of Washington,

pursuant to 28 U.S.C. §1407. See also Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 192 F.R.D. 459 (2000). In addition, the Panel has issued a conditional transfer order regarding this case. Defendants seek a stay until such time as the Panel determines whether the final transfer order will be entered.

In support of the motions for stay, defendants point to the possibility of inconsistent rulings among the courts concerning the issue now pending on motion to remand in various cases of whether or not K&B was fraudulently joined. Second, defendants argue that judicial economy would best be served by one court deciding that issue rather than numerous judges each independently reviewing the evidence and the law and independently deciding the issue. Finally, defendants argue that it would be unfair to require defendants to respond in each court to the very same arguments in multiple suits. In opposing defendants' motions to stay, plaintiff argues that the decision to stay is, of course, discretionary, that the motion to remand has been pending for over two weeks and that it is time to decide the motion to remand whether this court decides it or another court decides it. Plaintiff also argues that he would be inconvenienced and incur unnecessary expenses in litigating this matter "thousands of miles from home."

Although the decision whether or not to grant stay is discretionary with the court, my research reveals that where issues are presented which are similar to those pending before the

transferee court, the court should defer to the transferee court for decision. Indeed, the purpose of the transfer by the Panel on Multidistrict Litigation is for all pretrial proceedings. See 28 U.S.C. §1407(a). See, for example, In re Rezulin Products Liability Litigation, 133 F.Supp.2d 272 (2001).

The purpose of the conditional transfer order for "tag-a-long actions" is to allow the parties time to oppose the proposed order of transfer. The delay occasioned by the conditional transfer order is not to allow the transferee district court to quickly decide issues pending in the litigation. See Rule 7.4. 192 F.R.D. 459, et seq. This court recognizes, however, that the pendency of a transfer order does not in any way defeat or limit the authority of this court to rule upon matters properly presented to it for decision. See In re Air Crash at Paris, France, 376 F.Supp. 887 (Jud. Pan. Mult. Lit. 1974) cited in Boudreaux v Metropolitan Life Ins. Co., 1995 WL 83788 (E.D. La. 1995).

Although plaintiff argues that a Louisiana court can best decide issues of Louisiana law concerning the viability of the state law claims against defendant K&B, the fact is that there is a significant risk of inconsistent rulings in this and all other cases now pending in which the fraudulent joinder issue exists. In addition, there may be similar issues as to the addition of diversity destroying defendants in cases pending before the Panel from other states. A uniform decision with regard to those issues

in all such cases can best be made by the transferee court, not by this court. In addition, it makes no sense for this court to decide the remand issue in each of the cases now pending before it and for myriad other federal courts across the land to be required to study the record, research the law and write opinions on the identical issue. In other words, judicial economy is a strong factor in this case in favor of a stay. In addition, it would be manifestly unfair to require these defendants, which have been named as defendants in dozens of other similar cases, to defend each of those cases independently, or to be required to respond to motions to remand separately in each of those cases. As defendants correctly point out in brief, other courts routinely stay cases in such circumstances. See, for example, Boudreaux v. Metropolitan Life Ins. Co., 1995 WL 83788 (E.D. La. 1995)¹.

¹ The Fifth Circuit has not been directly presented with this issue. See Republic of Panama v. American Tobacco Co., Inc., 217 F.3d 343, 347 (5th Cir. 2000). Compare, however, Sliman v. Warner-Lambert Co., 2001 WL 515222 (E.D. La.), Vance J. Judge Vance also decided Boudreaux, Luna v. Warner-Lambert Co., 2001 WL 515223 (E.D. La.); Dixon v. Warner-Lambert Co., 2001 WL 515226 (E.D. La.); Pearl v. Warner-Lambert Co., 2001 WL 515227 (E.D. La.); Macallanes v. Warner-Lambert Co., 2001 WL 515232 (E.D. La.); DeBlanc v. Warner-Lambert Co., 2001 WL 515234 (E.D. La.); Berry v. Warner-Lambert Co., 2001 WL 515236 (E.D. La.); Tinson v. Warner-Lambert Co., 2001 WL 531097 (E.D. La.); Spatz v. Warner-Lambert Co., 2001 WL 531100 (E.D. La.); Pellebon v. Warner-Lambert Co., 2001 WL 531104 (E.D. La.); Felker v. Warner-Lambert Co., 2001 WL 531110 (E.D. La.); Miller v. Warner-Lambert Co., 2001 WL 531113 (E.D. La.); Edwards v. Warner-Lambert Co., 2001 WL 531117 (E.D. La.); Carter v. Warner-Lambert Co., 2001 WL 515247 (E.D. La.).

In this case, transfer appears likely and it is most appropriate that the transferee court decide the remand issue.

Conclusion

For these reasons, IT IS RECOMMENDED that the district judge stay further proceedings in this case pending final determination by the Panel on Multidistrict Litigation as to whether a final order of transfer will be entered in the case and that decision on plaintiff's motion to remand be pretermitted pending lifting of the stay or transfer of the case.

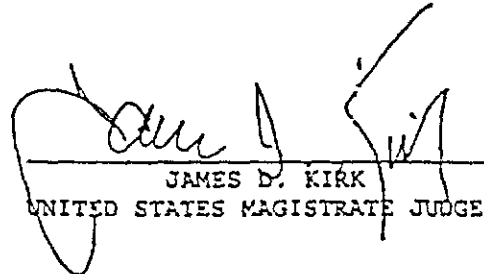
OBJECTIONS

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING

ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL
CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on
this the 16th day of October 2001.


JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

COPY SENT:

DATE: 10/22/01

BY: Coil

TO: Diliberato

Singleton

Penton

Meyer

Armand

Richard

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

FILED

NOV 16 2001

ROBERT H. SHERWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

TAMIKA McFEE

CIVIL ACTION NO. 01-1820-M

VERSUS

U.S. DISTRICT JUDGE ROBERT G. JAMES

BAYER CORPORATION, et al

U.S. MAGISTRATE JUDGE JAMES D. KIRK

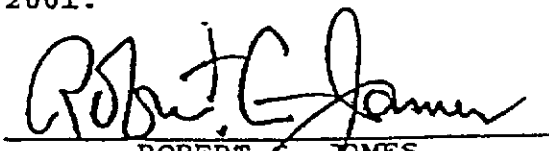
J U D G M E N T

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after an independent review of the entire record, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that Bayer Corporation's motion for stay [Doc. #15] is GRANTED, STAYING this case pending final determination by the Panel on Multidistrict Litigation as to whether a final order of transfer will be entered in the case.

IT IS FURTHER ORDERED that a decision on plaintiff's motion to remand [Doc. #8] is pretermitted pending lifting of the stay or transfer of the case.

THUS ORDERED AND SIGNED in Chambers at Monroe, Louisiana, on this 16 day of November 2001.


ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED

BY

COPY

11/19/01
S. J. [unclear]
Blanchard
Pennington
Armas
Arwin

(29)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEMWEILL, CLERK
DATE 10/19/01
BY tlw

TAMIKA McFEE

CIVIL ACTION NO. 01-1820-M

VERSUS

U.S. DISTRICT JUDGE ROBERT G. JAMES

BAYER CORPORATION,
GLAXOSMITHKLINE PLC AND
K&B CORPORATION

U.S. MAGISTRATE JUDGE JAMES D. KIRK

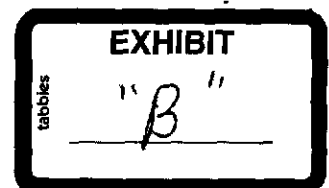
REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the court is plaintiff's motion to remand [Doc. #8] and motion for stay of proceedings [Doc. #15] filed on behalf of defendant Bayer Corporation ("Bayer"). The motions have been referred to the undersigned for decision and report and recommendation, respectively¹.

Plaintiff sued defendants for damages claimed as the result of the ingestion of phenylpropanolamine ("PPA"). Defendants Bayer and GlaxoSmithKline PLC ("GSK") are diverse defendants. However, K&B Corporation ("K&B") is a Louisiana corporation, the addition of which, if not fraudulently joined, destroys diversity. Defendant argues that K&B was fraudulently joined for the purpose of preventing jurisdiction in this court.

¹ Similar motions are pending before me in Henry Monk v. Bayer Corporation, et al. #01-1760-A and Tamika McFee v. Bayer Corporation, et al. #01-1820-M, Western District of Louisiana, Report and Recommendations on which are issued contemporaneously this date.

(26)



Plaintiff argues that the allegations contained in the complaint against K&B are based on Louisiana's law of redhibition, acknowledging that under Louisiana law a non-manufacturing seller of an allegedly defective product is not liable in tort, absent a showing that it knew or should have known that the product was defective and failed to declare it. Wilson v. State Farm Fire & Casualty Ins. Co., 94-1342 (La.App.3 Cir. 4/5/95), 654 So.2d 385, reh'g. den., writ. den., 95,1704 (La. 10/6/95), 661 So.2d 476. Here, plaintiff does not allege that K&B knew or should have known the product was defective, but alleges only that as a retail seller it is liable in redhibition for a product proven to be defective. Defendant argues that plaintiff's allegations in the complaint are inadequate to support a cause of action for redhibition.

In addition to opposing the motion to remand, defendant has asked this court to stay the entire proceeding, including the pending ruling on the plaintiff's motion to remand, until a determination can be made as to whether this case will be transferred pursuant to order of the Judicial Panel on Multi-district Litigation. Defendant points out that there are numerous cases in this district, as well as other district courts in Louisiana and in many other states, alleging damages as a result of the ingestion of PPA.

On August 28, 2001, the Panel transferred eight civil actions to the U.S. District Court for the Western District of Washington,

pursuant to 28 U.S.C. §1407. See also Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 192 F.R.D. 459 (2000).

In support of the motion for stay, defendant points to the possibility of inconsistent rulings among the courts concerning the issue now pending on motion to remand in various cases of whether or not K&B was fraudulently joined. Second, defendant argues that judicial economy would best be served by one court deciding that issue rather than numerous judges each independently reviewing the evidence and the law and independently deciding the issue. Finally, defendant argues that it would be unfair to require defendant to respond in each court to the very same arguments in multiple suits. In opposing Bayer's motion to stay, plaintiff argues that the decision to stay is, of course, discretionary, that the motion to remand has been pending for over two weeks and that it is time to decide the motion to remand whether this court decides it or another court decides it. Plaintiff also argues that she would be inconvenienced and incur unnecessary expenses in litigating this matter "thousands of miles from home."

Although the decision whether or not to grant stay is discretionary with the court, my research reveals that where issues are presented which are similar to those pending before the transferee court, the court should defer to the transferee court for decision. Indeed, the purpose of the transfer by the Panel on Multidistrict Litigation is for all pretrial proceedings. See 28

U.S.C. §1407(a). See, for example, In re Rezulin Products Liability Litigation, 133 F.Supp.2d 272 (2001).

The purpose of the conditional transfer order for "tag-a-long actions" is to allow the parties time to oppose the proposed order of transfer. The delay occasioned by the conditional transfer order is not to allow the transferee district court to quickly decide issues pending in the litigation. See Rule 7.4. 192 F.R.D. 459, et seq. This court recognizes, however, that the pendency of a transfer order does not in any way defeat or limit the authority of this court to rule upon matters properly presented to it for decision. See In re Air Crash at Paris, France, 376 F.Supp. 887 (Jud. Pan. Mult. Lit. 1974) cited in Boudreaux v. Metropolitan Life Ins. Co., 1995 WL 83788 (E.D. La. 1995).

Although plaintiff argues that a Louisiana court can best decide issues of Louisiana law concerning the viability of the state law claims against defendant K&B, the fact is that there is a significant risk of inconsistent rulings in this and all other cases now pending in which the fraudulent joinder issue exists. In addition, there may be similar issues as to the addition of diversity destroying defendants in cases pending before the Panel from other states. A uniform decision with regard to those issues in all such cases can best be made by the transferee court, not by this court. In addition, it makes no sense for this court to decide the remand issue in each of the cases now pending before it

and for myriad other federal courts across the land to be required to study the record, research the law and write opinions on the identical issue. In other words, judicial economy is a strong factor in this case in favor of a stay. In addition, it would be manifestly unfair to require this defendant, which has been named as defendant in dozens of other similar cases, to defend each of those cases independently, or to be required to respond to motions to remand separately in each of those cases. As defendant correctly points out in brief, other courts routinely stay cases in such circumstances. See, for example, Boudreaux v. Metropolitan Life Ins. Co., 1995 WL 83788 (E.D. La. 1995)².

In this case, transfer appears likely and it is most appropriate that the transferee court decide the remand issue.

² The Fifth Circuit has not been directly presented with this issue. See Republic of Panama v. American Tobacco Co., Inc., 217 F.3d 343, 347 (5th Cir. 2000). Compare, however, Sliman v. Warner-Lambert Co., 2001 WL 515222 (E.D. La.), Vance J. Judge Vance also decided Boudreaux, Luna v. Warner-Lambert Co., 2001 WL 515223 (E.D. La.); Dixon v. Warner-Lambert Co., 2001 WL 515226 (E.D. La.); Pearl v. Warner-Lambert Co., 2001 WL 515227 (E.D. La.); Magallanes v. Warner-Lambert Co., 2001 WL 515232 (E.D. La.); DeBlanc v. Warner-Lambert Co., 2001 WL 515234 (E.D. La.); Berry v. Warner-Lambert Co., 2001 WL 515236 (E.D. La.); Tinson v. Warner-Lambert Co., 2001 WL 531097 (E.D. La.); Spatz v. Warner-Lambert Co., 2001 WL 531100 (E.D. La.); Pellebon v. Warner-Lambert Co., 2001 WL 531104 (E.D. La.); Felker v. Warner-Lambert Co., 2001 WL 531110 (E.D. La.); Miller v. Warner-Lambert Co., 2001 WL 531113 (E.D. La.); Edwards v. Warner-Lambert Co., 2001 WL 531117 (E.D. La.); Carter v. Warner-Lambert Co., 2001 WL 515247 (E.D. La.).

Conclusion

For these reasons, IT IS RECOMMENDED that the district judge stay further proceedings in this case pending final determination by the Panel on Multidistrict Litigation as to whether a final order of transfer will be entered in the case and that decision on plaintiff's motion to remand be pretermitted pending lifting of the stay or transfer of the case.

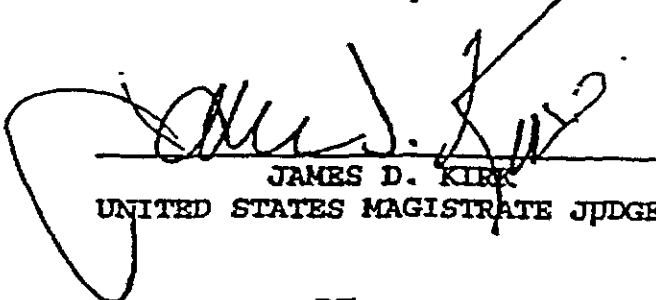
OBJECTIONS

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING

ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on this the 16th day of October 2001.


JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

COPY SENT:

DATE: 10/22/01

BY: caj

TO: Singleton

Penton

Diliberto

Blanchard

Armand

Green

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DAPHINE B. DONNELLY, ET AL

CIVIL ACTION

NO. 02-cv-2436

V

JUDGE ENGELHARDT

BAYER CORPORATION, ET AL.

MAGISTRATE SHUSHAN

NOTICE OF HEARING

PLEASE TAKE NOTICE that defendant, Novartis Consumer Health, Inc. through undersigned counsel, will bring its's Motion for Temporary Stay for hearing before the United States District Court for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, on the 2nd day of October, 2002, at 9 30 o'clock a.m .

Respectfully submitted,

BY: Eric R. Nowak

Sessions Fishman & Nathan L.L.P.

Joy Goldberg Braun (#3416) T A

Eric R. Nowak (#27025)

Shirin E. Harrell (#27495)

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and

Randolph S. Sherman
Lori B. Leskin
Danielle E. Finck
Kaye Scholer LLP
425 Park Avenue
New York, New York 10022

Attorneys for Defendant
NOVARTIS CONSUMER HEALTH, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13TH day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding by ___ hand delivery, ☒ U.S. mail or ___ facsimile transmission.



ERIC R. NOWAK



CASE: 2 02-cv-02436/P
DOCUMENT 19
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EASTERN DISTRICT OF LA

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LORLETA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/ A "WALGREENS")

* CIVIL ACTION
*
* NO 02-CV-2436
*
* JUDGE ENGELHARDT
*
* MAGISTRATE JUDGE SHUSHAN
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*
*

**CROSS-NOTICE OF VIDEOTAPED
DEPOSITION OF WALTER KERNAN**

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure, Rules 26 *et seq* , and in accordance with the Order of the United States District Court for the Western District of Washington, filed August 19, 2002, in the matter of *In Re Phenylpropanolamine (PPA) Products Liability Litigation*, MDL Docket No 1407, defendant Bayer Corporation and other manufacturer defendants will take the deposition of Walter N Kernan at the Omni Hotel - New Haven, 155 Temple Street, New Haven, CT 06510, commencing at 8 30 a m on September

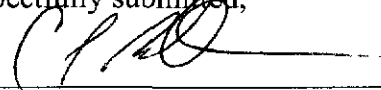
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18, 2002, and continuing on September 19, 2002 (at 8 30 a m) and September 20, 2002 (at 1 00 p m), or such other places, times and dates to which the parties and the witness may agree

Please take further notice that the witness has been directed to produce for inspection, copying, and use at the deposition the documents and things described in the attached Exhibit A

Please take further notice that the above deposition will be recorded by videotape as well as by stenographic means. The name and address of the videographer(s) will be provided prior to commencement of the deposition

Respectfully submitted,



Mary L. Meyer, Esq (19966)

John F. Olinde (1515)

Charles P. Blanchard (18798)

CHAFFE, MCCALL, PHILLIPS,

TOLER & SARPY, L.L.P.

2300 Energy Centre, 1100 Poydras Street

New Orleans, LA 70163-2300

Telephone (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 11th day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid



EXHIBIT "A"

As used herein, the term "document" or "documents" shall mean and include any written, printed, drawn, recorded, transcribed, filed or graphic matter, however produced, reproduced, or stored on computer or otherwise electronically stored, and any originals, copies, drafts, revisions, or amendments thereof. "Document" or "Documents" shall include, by way of example and without limitation, letters, memoranda, notes, e-mails, test data, charts, x-rays, reports, medical records, records of payment, diagrams, manuals, test procedures, sketches, graphs, prints, secretarial notes, work pads, diaries, films, tapes, videotapes, photographs, computer disks, computer printouts, computer memory banks, books, publications, literature, announcements, or other writings or tangible objects. Further, "document" or "documents" requested herein extend to and include any and all such materials within the possession, custody, or control of you and your agents, attorneys, or representatives, regardless of where located. For any document withheld from production, and any document redacted in any manner, please identify the document withheld or redacted by date, author, type of document, subject matter, recipient, and any grounds for withholding or redaction of the document. You are to produce the materials in your possession, custody, or control listed below.

- 1 All documents related to the initiation of the Yale Hemorrhagic Stroke Project (hereinafter "HSP")
- 2 All documents related to the organizational structure of persons involved in the HSP
- 3 All documents relating to the study personnel's experience and credentials (including but not limited to the curriculum vitae of each professional who participated in the study)
- 4 All medical literature and case reports that were considered, reviewed, relied upon, and/or utilized in any manner by you or by any investigator or other personnel involved in the HSP from the inception of the HSP until its publication in the New England Journal of Medicine
- 5 All documents related to the Protocol for the HSP including, but not limited to
 - a) all documents related to the creation or development of the Protocol,
 - b) all documents related to the estimation of the sample size, including MRI market research data,
 - c) all documents related to or containing communications with anyone regarding the Protocol,
 - d) all documents related to comments, revisions, or modifications to the Protocol, and

- e) all drafts of the protocol
- 6 All documents related to obtaining Institutional Review Board Approval of the HSP
- 7 All documents related to the conduct of the HSP including, but not limited to
- a) all documents regarding or concerning the network of participating hospitals,
 - b) all documents regarding the recruitment of investigators, hospitals, and all persons involved in any way in the HSP,
 - c) all procedure manuals and all investigator's brochures, and
 - d) all documents regarding the training of any and all persons involved in the HSP, including but not limited to training manuals, training videotapes, training attendance, identity of trainers, and confirmation of training
- 8 All documents related to the ascertainment of cases in the HSP including, but not limited to, all documents regarding
- a) the active surveillance program,
 - b) the surveillance team,
 - c) the case definition,
 - d) methods of case ascertainment, and
 - e) exclusion criteria
- 9 All documents related to the selection of controls in the HSP including, but not limited to, all documents regarding the use of random digit dialing and all documents concerning telephone numbers that did not result in an eligible person or control
- 10 All documents related to data collection and processing in the HSP including, but not limited to
- a) all data collection forms,
 - b) all interview data forms,
 - c) training manuals for interviewers,

- d) data logs regarding cases and controls,
- e) all case identification forms,
- f) all potential control forms;
- g) all log-in records,
- h) all data editing, coding and validation manuals,
- i) all screening questionnaires,
- j) all documents and records reviewed by a panel of stroke neurologists involved in the determination of whether eligibility criteria were met,
- k) all documents and records reviewed or generated by study physicians,
- l) all documents and records, including logs, regarding stroke patients rejected as not meeting eligibility criteria,
- m) all medical records and scans (e.g , CT, MRI, MRA, angiogram, etc),
- n) all documents regarding scheduling of interviews and collection of information from all study participants,
- o) all product identification books, photographs, and charts,
- p) all drug containers and drug labels furnished by study participants,
- q) all documents related to observations of interviews,
- r) all documents related to the assignment of interviewers,
- s) all documents related to surrogate/proxy interviews,
- t) all documents related to the use or handling of data or information obtained from surrogate/proxy interviews,
- u) all data abstraction forms,
- v) all coding forms,
- w) all documents related to codes, including their definition,
- x) all documents relating to the monitoring of sample size,

- y) all documents related to modification of any aspect of the HSP,
 - z) every participating subject's folder and all contents of the folder,
 - aa) all audio tapes of interviews of study subjects,
 - bb) all financial reports, and
 - cc) all documents regarding the disbursement of funds
- 11 All documents regarding the proxy respondent sub-study
- 12 All documents regarding communications concerning the HSP including, but not limited to, all documents regarding communications:
- a) between persons participating in the conduct of the HSP (For purposes of this Item 12, "conduct" is defined to including without limitation the design of the HSP, analysis of data, variations of or amendments to the HSP protocol variations, and the drafting or revision of abstracts, summaries, manuscripts and/or submissions relating to the HSP),
 - b) between anyone involved in the conduct of the HSP and any other person or organization including, but not limited to, yourself, the Food and Drug Administration, the Nonprescription Drug Manufacturers Association, the Consumer Healthcare Products Association, any member of the Scientific Advisory Group, pharmaceutical companies, and/or any of their current or former employees, members or representatives,
 - c) between anyone involved in the conduct of the HSP and any person claiming injury from use of PPA-containing medication,
 - d) with physician investigators,
 - e) with participating hospitals including, but not limited to, communications with the surveillance officers and the admissions offices at the participating hospitals,
 - f) with the Principal Investigator at each participating study site,
 - g) with each case's physician,
 - h) with any medical or scientific journals including, without limitation, the New England Journal of Medicine,

- i) with any physicians, epidemiologists, statisticians, or other professionals asked by any person or entity (including, but not limited to, the New England Journal of Medicine) to conduct a peer review of the study and its results,
 - j) between HSP investigators and any member of the Scientific Advisory Group,
 - k) between HSP investigators and the New England Journal of Medicine, and
 - l) with any other person at any of the participating institutions
- 13 All documents related to the Scientific Advisory Group including, but not limited to, communications, reports, site visits, and travel expenses
- 14 All documents regarding the handling, calculations, or use of any and all data obtained regarding the HSP including, but not limited to
 - a) all electronic analysis files,
 - b) all documents related to interim data analysis,
 - c) all final analysis files, and
 - d) all data access logs,
 - e) all database dictionary files,
 - f) all data collection instruments,
 - g) all databases constructed from the questionnaires,
 - h) all databases for each intermediate and final analysis that relates to the Final Report and the New England Journal of Medicine article,
 - i) all analyses not included in the Final Report or the New England Journal of Medicine Article,
 - j) all analyses done after receipt of comments from or on behalf of CHPA or any predecessor organization of CHPA,
 - k) all documents concerning the use of and/or difference between data analysis via a one-tailed or two-tailed statistical test,

- l) all documents concerning the adjustment of variables and analyses used for the adjustment of variables
- 15 All documents regarding the Final Report of the HSP and its preparation including, but not limited to, all communications, comments and drafts
- 16 All documents regarding the publication of the HSP in the New England Journal of Medicine, including but not limited to correspondence dated after publication of the HSP in the New England Journal of Medicine
- 17 All documents evidencing revisions, changes, additions, or deletions made to the Final Report of the HSP (and/or the data contained in that report) prior to the publication of the study's results in the New England Journal of Medicine
- 18 All documents regarding conferences, discussions, or meetings with FDA regarding the HSP, including, without limitation, documents concerning preparations for October 19, 2000 hearing
- 19 All documents relating to any comments about, or criticisms of, The HSP from any source including, without limitations, letters to the editor concerning the HSP
- 20 All documents regarding the Authors' Reply published in the April 5, 2001 New England Journal of Medicine including, but not limited to, all data analyses and communications with anyone after publication
- 21 All documents relating to the removal or refiling of any document responsive to any of the above categories

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|-------------------------------------|---|--------------------------|
| DAPHINE DONNELLY, and | * | CIVIL ACTION |
| JEROME DONNELLY, Husband | * | |
| | * | NO 02-CV-2436 |
| VERSUS | * | |
| | * | JUDGE ENGELHARDT |
| BAYER CORPORATION, NOVARTIS | * | |
| PHARMACEUTICALS CORPORATION, | * | MAGISTRATE JUDGE SHUSHAN |
| NOVARTIS CONSUMER HEALTH, INC , | * | |
| 4 LIFE RESEARCH, LC, Successor by | * | |
| merger to SHAPERITE, SMOOTHIE KING* | * | |
| CO , INC , SMOOTHIE KING SYSTEMS, | * | |
| INC , and WALGREEN LOUISIANA | * | |
| CO , INC , (d/b/a "Walgreens") | * | |
| * * * * * | * | |

MEMORANDUM IN OPPOSITION TO WALGREEN'S MOTION TO DISMISS

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Daphine Donnelly and her husband Jerome Donnelly, who respectfully submit this Memorandum in Opposition to Walgreen's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) Defendant has filed a Motion to Dismiss asserting that Plaintiffs' claims are prescribed pursuant to Louisiana Civil Code Art 3492 The Defendant has erroneously combined a Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss with a Louisiana Code of Civil Procedure Art 927 Peremptory Exception of Prescription Plaintiff will treat this as a Motion to Dismiss and address the prescription issue For

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the following reasons, Walgreen's Motion to Dismiss should be denied

BACKGROUND

Plaintiff Daphne Donnelly suffered a stroke on or about January 12, 1991 as a result of ingesting PPA/ephedrine-containing products, including, but not limited to Alka-Selzer Plus and Tavist-D. Ms. Donnelly purchased the Alka-Selzer Plus and the Tavist-D at Walgreens in Chalmette, Louisiana. As noted in Paragraph 8 of Plaintiff's petition, the causal relationship of Ms. Donnelly's injury to the products containing PPA/ephedrine was inherently undiscoverable until she was warned of the dangers of ingesting the product.

On November 6, 2000, the FDA officially recommended that all makers of over-the-counter pharmaceuticals that contain PPA voluntarily remove this chemical from the pharmaceutical. By correspondence of the same date, the FDA urged all manufacturers and sellers of over-the-counter medications containing PPA to cease immediately the distribution and sale of said products. Also on November 6, 2000, the FDA's Nonprescription Drug Advisory Committee issued an advisory warning consumers of the risk of hemorrhagic stroke and warned consumers not to use any medications that contain PPA.

Prior to November 6, 2000, Plaintiff did not discover, nor through the exercise of reasonable care and diligence could she have discovered, that her injury and illness in 1991 was in any way related to the products containing PPA/ephedrine. It was only after the publicity associated with the FDA warning that Plaintiff became aware that PPA containing products were withdrawn from the market, and further, that ephedrine contains many of the same ingredients and has been linked to many injuries and deaths relating to its ingestion, just as with PPA-containing products.

As noted by the Defendant, Louisiana Civil Code Art. 3492 sets forth a one-year prescriptive period for delictual actions. However, the doctrine of *contra non valentem* suspends prescription during the period of time that the cause of action was unknown to the plaintiff. Several class action petitions¹, one of which was a Louisiana state class action petition (see Fife in Footnote No. 1) were filed within one year of the November 6, 2000 FDA warning to the public and the removal of the PPA-containing products from the market. These class action petitions protected the rights of the Plaintiffs herein and prescription was suspended pending judgment of the class certification issue. Judge Rothstein denied class certification in the MDL per order dated June 5, 2002.

According to Louisiana Code of Civil Procedure Rule 596, prescription which has been suspended begins to run 30 days after notice to the class that the court has denied a motion to certify the class. Plaintiffs filed suit on July 2, 2002 – within 30 days of the denial of class certification.

ARGUMENT

In evaluating a Motion to Dismiss filed under F.R.C.P., 12(b)(6), the moving party bears the burden of showing that the plaintiff can prove no set of facts consistent with the allegations in the Petition for Damages that would entitle her to relief. Baton Rouge Building and Construction Trades Council, AFL-CIO v. Jacobs Constructors, Inc., 804 F.2d 879 (5th Cir. 1986). In addition, the reviewing Court “must accept as true well-pleaded averments and view them in light most favorable to

¹ The following cases are in MDL 1407, *In Re Phenylpropanolamine (PPA) Products Liability Litigation in the United States District Court for the Western District of Washington*: *Ricks, et al. v. American Home Products Corp., et al.*, No. C01-2144R; *Havard v. SmithKline Beecham, Inc., et al.*, No. C01-1645R; and *Fife, et al. v. American Home Products Corp., et al.*, No. C01-2144R.

the plaintiff” American Waste and Pollution Control Co v Browning-Ferris, Inc., 949 F 2d 1384, 1386 (5th Cir 1991)

Walgreen’s would have this Court believe that the suit brought by Plaintiffs Daphine and Jerome Donnelly is prescribed since Ms Donnelly suffered from a stroke in January 1991 and did not file suit until July 2, 2002 While Louisiana Civil Code Art 3492 states that delictual actions are subject to a liberative prescription of one year commencing to run from the day the injury or damage is sustained, statutes governing prescription are strictly construed against prescription and in favor of the Obligation sought to be extinguished Babkow v Morris Bart, PLC, 98-0256 (La App 4 Cir 12/16/98), 726 So 2d 423 With two possible constructions, the one that favors maintaining, as opposed to barring, an action should be adopted Id citing Bustamento v Tucker, 607 So 2d 532 (La 1992)

Under the doctrine of contra non valentum, prescription may be suspended during the period in which the cause of action was not known by or reasonably knowable by the plaintiff Williams v Lafayette Ins., 98-2855 (La App 4 Cir 5/19/99), 740 So 2d 183 citing La Plaque Corporation v Chevron U S A, Inc., 93-1597 (La App 4 Cir 5/26/94), 638 So 2d 354, 356, writ denied, 94-1597 (La 11/11/94), 644 So 2d 395

In the Williams case, Florianna Williams filed suit individually, and on behalf of her minor son Carey Williams, who suffered from lead poisoning caused by eating lead-based peeling paint in their apartment Although Carey Williams was first tested for lead poisoning in September 1993, Ms Williams was never notified of the source of the lead contamination until December 1994 She filed suit in March 1995 The trial court dismissed her suit based on prescription noting that she knew of the lead poisoning in the fall of 1993 The Fourth Circuit Court of Appeals reversed noting that

under the doctrine of contra non valentum, prescription was suspended until plaintiffs knew that the peeling paint in the home was the source of the lead poisoning, and that date was December 1994

The Williams case is similar to the case at hand. The Donnelly's could not have reasonably discovered that Ms. Donnelly's stroke was in any way related to the PPA products she ingested. It was not until the warnings were made public by the FDA that she was able to make the causal relation between the two. Prescription is usually suspended where the cause of action is not known or reasonably knowable by the plaintiff even though his ignorance is not induced by the defendant. Wimberly v. Gatch, 93-2361 (La. 4/11/94), 635 So. 2d 206, 211 rehearing denied, (5/12/94). This is commonly known as the discovery rule.

The discovery rule is applicable to the present case. The Donnelly's could not have reasonably made the connection between her use of the medication and her stroke in 1991. It was not until November 2000 that the public was made aware of the dangers of ingesting PPA/ephedrine containing products. A class action petition was filed that protected the Donnelly's right of action and prescription was suspended pending determination of the class certification issue. Prescription for the Donnelly's cause of action began running 30 days after class certification was denied on June 5, 2002. The Donnelly's filed suit before the 30 days had run – on July 2, 2002.

CONCLUSION

For the reasons set forth above, Plaintiffs pray that Walgreen's Motion to Dismiss be denied.

Respectfully submitted,

By *Chandler Loupe*
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CLAITOR & LOUPE, LLC
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Baton Rouge, Louisiana 70808
225/767-2222 (Telephone)
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record by placing same in the United States mail, properly addressed and postage prepaid

DATED, this 10th day of Sept., 2002

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J. Chandler Loupe

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CASE: 2-02-cv-02436/P
DOCUMENT: 17
DATE: 09/10/02
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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 SEP 10 PM 2:26

LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | | |
|------------------------------------|---|--------------------------|
| DAPHINE DONNELLY, and | * | CIVIL ACTION |
| JEROME DONNELLY, Husband | * | |
| | * | NO 02-CV-2436 |
| VERSUS | * | |
| | * | JUDGE ENGELHARDT |
| BAYER CORPORATION, NOVARTIS | * | |
| PHARMACEUTICALS CORPORATION, | * | MAGISTRATE JUDGE SHUSHAN |
| NOVARTIS CONSUMER HEALTH, INC , | * | |
| 4 LIFE RESEARCH, LC, Successor by | * | |
| merger to SHAPERITE, SMOOTHIE KING | * | |
| CO , INC , SMOOTHIE KING SYSTEMS, | * | |
| INC , and WALGREEN LOUISIANA | * | |
| CO , INC , (d/b/a "Walgreens") | * | |
| * * * * * | | |

MEMORANDUM IN OPPOSITION TO BAYER'S MOTION FOR DISMISSAL

NOW INTO COURT, through undersigned counsel, comes plaintiffs, Daphine Donnelly and Jerome Donnelly, Husband (hereinafter referred to as "Plaintiffs"), respectfully submit this Memorandum in Opposition to Bayer's Motion for Dismissal Pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant has filed a Motion to Dismiss asserting that plaintiffs' claims in negligence, gross negligence, and strict liability should be dismissed. Furthermore, Defendant asserts the Louisiana Products Liability Act (Louisiana Revised Statute 9:2800.54 et seq., hereinafter referred to as "LPLA") establishes the exclusive theories of recovery against a manufacturer in a personal injury action and does not provide for recovery based on the aforementioned claims. For the

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following reasons, Bayer's Motion to should be denied

1 Background

Plaintiff filed this suit in the 34th Judicial District Court against Bayer Corporation, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc , 4Life Research, Successor by merger to Shaperite, Smoothie King Co , Inc , Smoothie King Systems, Inc , and Walgreen Louisiana Co , Inc , d/b/a "Walgreens" for marketing, selling, distributing, and/or manufacturing Shaperite, Alka Seltzer Plus and Tavist-D, all PPA-containing products

Plaintiffs claim in the Petition for Damages that the defendant, directly or indirectly, manufactured and sold medications that contained Phenylpropanolamine ("PPA") to Plaintiff, Daphne Donnelly (Petition ¶ 8-12) Plaintiffs allege that defendant knew or should have known about medical research and publications associating PPA with serious health risks (Petition ¶ 6-7) Defendant (Bayer) failed to provide warnings of these side-effects and risks associated with the use of PPA-containing medications (Petition ¶ 15) Plaintiffs have averred that defendant was aware of these risks associated with PPA and concealed its knowledge of the risks from Plaintiff and consumers (Petition ¶ 16) As a result of ingesting the PPA-containing medication, Plaintiff, Daphne Donnelly, suffered a stroke on or about January 1991 which resulted in, but not limited to, paralysis of the right side of the body (Petition ¶ 10)

2 Argument

1 Applicable Standard

In evaluating a Motion to Dismiss filed under F R C P , 12(b)(6), the moving party bears the burden of showing that the plaintiff can prove no set of facts consistent with the allegations in the Petition for Damages which would entitle it to relief *Baton Rouge Building and Construction*

Trades Council, AFL-CIO v Jacobs Constructors, Inc , 804 F 2d 879 (5th Cir , 1986) In addition, the reviewing Court “must accept as true well-plead averments and view them in light most favorable to the plaintiff” *American Waste and Pollution Control Co v Browning-Ferris, Inc* , 949 F 2d 1384, 1386 (5th Cir 1991)

2 Plaintiff Has Asserted Viable Claims for Compensatory Damages Under Louisiana Law

Plaintiffs have asserted allegations under the LPLA, which admittedly control the claims set forth by the plaintiffs Under the LPLA, plaintiffs can prove a product is “unreasonably dangerous or defective (1) in construction or composition, (2) in design, (3) because of inadequate warning, or (4) because of nonconformity to an express warranty” La R S 9 2800 54 *et seq*

Nonetheless, plaintiffs’ allegations regarding negligence, gross negligence, strict liability, and breach of implied warranty against redhibitory defects relating to non-economic damages can still support plaintiffs’ LPLA claims and breach of warranty against redhibitory defects relating to economic damages In *Busse, et al v Bayerische Motoren Werke, A G , et al* , 1996 WL 732837 (E D La 1996), the plaintiff alleged claims for negligence, redhibition and products liability claims against a product manufacturer Similar to the instant matter, the defendant in *Busse* moved for summary judgment as to claims by the plaintiff not cognizable under the LPLA The Court denied the motion stating that the allegations of negligence supported plaintiff’s claim for relief under the LPLA *Id*

This is consistent as the theories articulated under the LPLA “are predicated on principles of strict liability, negligence, or warranty, respectively” *Jefferson v Lead Industries Assoc , Inc et al* , 106 F 3d 1245, 1251 (5th Cir 1997) Therefore, the allegations set forth in plaintiffs’ Petition for

Damages relating to negligence, gross negligence, and strict liability should not be dismissed as they further strengthen plaintiffs' other claims

3 Conclusion

For the foregoing reasons, Plaintiff prays that Bayer's Motion to Dismiss be denied

Respectfully submitted,

By *Chandler Loupe*
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CASE: 2:02-cv-02436/P
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EASTERN DISTRICT OF LA

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LORELLA G. WHYTE
CLERK

MINUTE ENTRY
SEPTEMBER 9, 2002
ENGELHARDT, J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, et al

CIVIL ACTION

VERSUS

NO. 02-2436

BAYER CORPORATION, et al

SECTION "N"

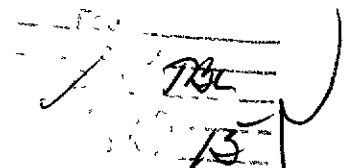
Considering that the plaintiff's Motion to Remand and Novartis Pharmaceutical's Corporations Motion to Dismiss is noticed for hearing on October 2, 2002,

IT IS ORDERED that the Motions to Dismiss filed on behalf of defendants, Walgreen Louisiana Company, Inc. and Bayer Corporation, presently noticed for hearing on September 18, 2002 are hereby CONTINUED and RENOTICED for Wednesday, October 2, 2002 at 9:30


UNITED STATES DISTRICT JUDGE

DATE OF ENTRY

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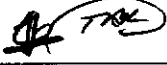




CASE: 2:02-cv-02436
DOCUMENT: 15
DATE: 09/10/02
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Notices sent to:

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EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, ET AL.

CIVIL ACTION

NO.: 02-2436

VERSUS

JUDGE ENGELHARDT

BAYER CORPORATION, ET AL.

MAGISTRATE JUDGE SHUSHAN

**NOVARTIS CONSUMER HEALTH INC.'S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant Novartis Consumer Health, Inc ("NCH") moves this Court to dismiss the plaintiffs' claims that are not permitted by Louisiana law. Under the Louisiana Products Liability Act—La. Rev. Stat. § 9:2800.52—a plaintiff injured by a product may only assert four theories of liability against the manufacturer of the product. Thus, as more fully explained in its memorandum in support of this motion, the plaintiffs' non-LPLA claims fail to state a claim upon which relief can be granted, and should be dismissed.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this day of Sept., 2002 served a copy of the foregoing pleading on counsel for all parties to this proceeding by hand delivery, U.S. Mail or facsimile transmission.

Eric R. Nowak
ERIC R. NOWAK

By Eric R. Nowak
JOY GOLDBERG BRAUN, T.A. (#3416)

ERIC R. NOWAK (#27025)

SHIRIN E. HARRELL (27495)

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Attorneys for Novartis Consumer Health, Inc.

Produced Pursuant to Protective Order in Case No. 02-2436
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Date Filed 10/10/02
By 14

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DAPHINE B. DONNELLY, ET AL.

CIVIL ACTION

NO.: 02-2436

VERSUS

JUDGE ENGELHARDT

BAYER CORPORATION, ET AL.

**MAGISTRATE JUDGE
SHUSHAN**

**MEMORANDUM IN SUPPORT OF NOVARTIS CONSUMER HEALTH, INC.'S
MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)**

To decide Novartis Consumer Health, Inc.'s ("NCH") Motion to Dismiss Pursuant to Federal Rule of Procedure 12(b)(6), the Court needs to address one issue

- **Exclusive Remedies under the LPLA.** Under the Louisiana Products Liability Act, parties injured by a product can only sue the manufacturer under four theories (i) manufacturing defects, (ii) design defects, (iii) failure to warn, (iv) or warranty actions. The plaintiff sues NCH for injuries allegedly caused by its product, Tavist-D®, an over-the-counter cold medication. In addition to LPLA claims, the petition makes claims against NCH for fault, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy. These non-LPLA claims – the non-manufacturing, non-design, non-warning, and non-warranty claims – should be dismissed. La. Rev Stat § 9.2800 52

I

Procedural and Factual Background

The plaintiffs sued NCH in state court claiming that NCH manufactured, designed, marketed, advertised, and sold Tavist-D®.¹ The plaintiffs allege that Daphne Donnelly ingested Tavist-D®, which at that time contained phenylpropanolamine, also known as “PPA.”² According to the plaintiffs, the PPA containing Tavist-D® allegedly caused the plaintiff to suffer a stroke on or about January 12, 1991.³ The plaintiffs claim that NCH is liable under the Louisiana Products Liability Act and for fault, negligence, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy.⁴

NCH seeks summary dismissal of all plaintiffs’ claims disallowed by the exclusive remedies provision of the LPLA. The personal injury claims for fault, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy are not cognizable against NCH – the manufacturer of the product at issue.

¹ See *Petition for Damages* ¶¶ 8, 11

² See *Petition for Damages* ¶ 11

³ See *Petition for Damages* ¶ 10, 11

⁴ See *Petition for Damages* ¶¶ 16, 17, 18 (incorrectly numbered as the second paragraph 15), and 19 (incorrectly numbered as the second paragraph 16)

II

Law and Argument

The Louisiana Products Liability Act Provides the Exclusive Theory of Recovery Against a Manufacturer for Damage Caused by a Product

The law clearly states that the Louisiana Products Liability Act “establishes the exclusive theories of liability for manufacturers for damages caused by their products.”⁵ The only four theories of recovery that plaintiffs may assert against manufacturers under the LPLA are

- manufacturing defects (faulty composition or construction)
- design defects
- failure to warn
- warranty actions ⁶

As John Kennedy, an original author of the LPLA, explained, this law defines and limits the extent of a manufacturer’s liability for damages caused by its product

The point now in terms of the act’s scope is that a products liability plaintiff may no longer recover in Louisiana from a manufacturer on the basis of any theory of tort liability that is not set forth in the LPLA.⁷

This exclusivity principle has been systematically applied to suits against manufacturers by Louisiana state courts, the U S District Courts in Louisiana, and the U.S Court of Appeals for

⁵ La Rev Stat § 9 2800 52

⁶ La Rev Stat Ann §9 2800 54

⁷ John Kennedy, A Primer on the Louisiana Products Liability Act, 49 LA LAW REV 566, 571 (1989)

the 5th Circuit.⁸ And, the courts have not hesitated to treat cases against drug and medical device manufacturers like those against any other manufacturer under the LPLA.⁹

The plaintiff's suit in this case is not unlike other suits pared down by Louisiana courts applying the LPLA. In Archie v R J Reynolds Tobacco Co., the plaintiff alleged multiple theories of liability against a cigarette manufacturer. The trial court summarily dismissed all theories not enumerated in the LPLA. The ruling was upheld on appeal.¹⁰ Similarly, in Grenier v Medical Eng'g Corp., the U S Fifth Circuit affirmed the summary dismissal of all causes of action asserted against a breast-implant manufacturer that were not consistent with the LPLA.¹¹ In Grenier, the plaintiff asserted over 10 different theories of liability, several of which are

⁸ Ashley v General Motors Corp., 27,851 (La App 2 Cir 1/24/96) 666 So 2d 1320, see also Grenier v Medical Eng'r Corp., 99 F Supp 2d 759, 763 (W D La 2000) aff'd by 243 F 3d 200, 203 (5th Cir 2001), Brown v R J Reynolds Tobacco Co., 52 F 3d 524, 526 (5th Cir 1995)

⁹ Wheat v Pfizer, INC., 31 F 3d 340, 342 (5th Cir 1994)(prescription drug case), Zachary v Dow Corning Corp., 844 F Supp 1061, 1062-65 (M D La 1995)(medical device – wrist prosthesis)

¹⁰ 96-978 (La App 5 Cir 6/30/97) 698 So 2d 423, 425

¹¹ Grenier v Medical Eng'r Corp., 99 F Supp 2d 759, 763 (W D La 2000) aff'd by 243 F 3d 200, 203 (5th Cir 2001)

similar to the allegations being asserted by the plaintiff in the case before this Court

- negligence,
- fraud,
- misrepresentation,
- breach of warranty of fitness and for a particular purpose,
- fraud by concealment, and
- false advertising


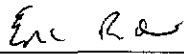
The Grenier trial court held that these claims were “well outside the scope of the LPLA, and must be dismissed.” The 5th Circuit affirmed stating that if the LPLA applied in time (a post 1988 injury) then “the LPLA establishes four exclusive theories of liability.”

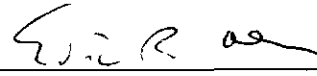
Likewise, the plaintiff’s claims against NCH for personal injury damages caused by its product, Tavist-D®, are limited to the four avenues recognized by the LPLA. The plaintiffs allege that NCH is liable for LPLA violations and for fault, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy. But only the LPLA claims are permitted against NCH. Thus, as explained by the Eastern District in Jefferson v. Lead Indus., the other non-LPLA, even if based upon traditional principles of negligence, strict liability, or warranty, are not viable as independent theories.¹² Accordingly, all claims asserted against NCH, the manufacturer, save the specific LPLA claims should be dismissed.

¹² Jefferson v. Lead Indus. Ass’n, INC., 930 F Supp 241 (E.D. La. 1996)

III CONCLUSION

The plaintiffs sue NCH for personal injuries allegedly suffered from taking an over-the-counter cold medication, Tavist-D®. Their suit – claims against a manufacturer for injuries from the manufacturer's product – is governed by the Louisiana Products Liability Act. Under the LPLA, the plaintiffs are limited to four theories of recovery recognized by the act. All other claims must be dismissed.

| <u>CERTIFICATE OF SERVICE</u> | |
|---|---|
|  | I do hereby certify that I have on this day of <u>Feb</u> , 2002 served a copy of the foregoing pleading on counsel for all parties to this proceeding by hand delivery, U.S. Mail or facsimile transmission. |
|  _____ ERIC R. NOWAK | |

By: 
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ERIC R. NOWAK (#27025)
SHIRIN E. HARRELL (27495)
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 Telephone (504) 582-1500
**Attorneys for Novartis Consumer Health,
 Inc.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, ET AL.

VERSUS

BAYER CORPORATION, ET AL.

CIVIL ACTION

NO.: 02-2436

JUDGE ENGELHARDT

MAGISTRATE JUDGE SHUSHAN

NOTICE OF HEARING

PLEASE TAKE NOTICE, that defendant, Novartis Consumer Health, Inc , through undersigned counsel will bring the attached Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted for hearing before the United States District Court for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, on the 2nd day of October 2002, at 9:30 a m

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of Sept, 2002 served a copy of the foregoing pleading on counsel for all parties to this proceeding by hand delivery, U S Mail or facsimile transmission

Eric R. Nowak
ERIC R. NOWAK

Respectfully submitted,

By Eric R. Nowak

JOY GOLDBERG BRAUN (#3416)

ERIC R. NOWAK (#27025)

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Attorneys for Novartis Consumer Health,
Inc.



CASE: 2:02-cv-02436/P
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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DAPHINE B. DONNELLY, ET AL.

**CIVIL ACTION
NO.: 02-2436**

VERSUS

JUDGE ENGELHARDT

BAYER CORPORATION, ET AL.

MAGISTRATE JUDGE SHUSHAN

**MEMORANDUM IN SUPPORT OF NOVARTIS PHARMACEUTICALS
CORPORATION'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)**

To decide Novartis Pharmaceuticals Corporation's ("NPC") Motion to Dismiss Pursuant to Federal Rule of Procedure 12(b)(6), the Court needs to address one issue

- **Exclusive Remedies under the LPLA.** Under the Louisiana Products Liability Act, parties injured by a product can only sue the manufacturer under four theories (i) manufacturing defects, (ii) design defects, (iii) failure to warn, (iv) or warranty actions. The plaintiff sues NPC for injuries allegedly caused by its product, Tavist-D®, an over-the-counter cold medication. In addition to LPLA claims, the petition makes claims against NPC for fault, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy. These non-LPLA claims – the non-manufacturing, non-design, non-warning, and non-warranty claims – should be dismissed. La. Rev. Stat. § 9:2800.52.

I

Procedural and Factual Background

The plaintiffs sued NPC in state court claiming that NPC manufactured, designed, marketed, advertised, and sold Tavist-D®.¹ The plaintiffs allege that Daphine Donnelly ingested Tavist-D®, which at that time contained phenylpropanolamine, also known as “PPA.”² According to the plaintiffs, the PPA containing Tavist-D® allegedly caused the plaintiff to suffer a stroke on or about January 12, 1991.³ The plaintiffs claim that NPC is liable under the Louisiana Products Liability Act and for fault, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy.⁴

NPC seeks summary dismissal of all plaintiffs’ claims disallowed by the exclusive remedies provision of the LPLA. The personal injury claims for fault, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy are not cognizable against NPC – the manufacturer of the product at issue.

¹ See *Petition for Damages* ¶¶ 8, 11

² See *Petition for Damages* ¶ 11

³ See *Petition for Damages* ¶¶ 10, 11

⁴ See *Petition for Damages* ¶¶ 16, 17, 18 (incorrectly numbered as the second paragraph 15), and 19 (incorrectly numbered as the second paragraph 16)

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The plaintiff's suit in this case is not unlike other suits pared down by Louisiana courts applying the LPLA. In Archie v. R. J. Reynolds Tobacco Co., the plaintiff alleged multiple theories of liability against a cigarette manufacturer. The trial court summarily dismissed all theories not enumerated in the LPLA. The ruling was upheld on appeal.¹⁰ Similarly, in Grenier v. Medical Eng'g Corp., the U. S. Fifth Circuit affirmed the summary dismissal of all causes of action asserted against a breast-implant manufacturer that were not consistent with the LPLA.¹¹ In Grenier, the plaintiff asserted over 10 different theories of liability, several of which are

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⁹ Wheat v. Pfizer, INPC, 31 F.3d 340, 342 (5th Cir. 1994) (prescription drug case), Zachary v. Dow Corning Corp., 844 F. Supp. 1061, 1062-65 (M.D. La. 1995) (medical device – wrist prosthesis).

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¹¹ Grenier v. Medical Eng'r Corp., 99 F. Supp. 2d 759, 763 (W.D. La. 2000) aff'd by 243 F.3d 200, 203 (5th Cir. 2001).

similar to the allegations being asserted by the plaintiff in the case before this Court

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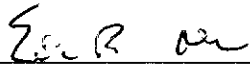
The Grenier trial court held that these claims were “well outside the scope of the LPLA, and must be dismissed.” The 5th Circuit affirmed stating that if the LPLA applied in time (a post 1988 injury) then “the LPLA establishes four exclusive theories of liability.”

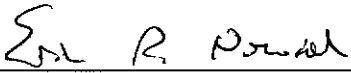
Likewise, the plaintiff’s claims against NPC for personal injury damages caused by its product, Tavist-D®, are limited to the four avenues recognized by the LPLA. The plaintiffs allege that NPC is liable for LPLA violations and for fault, want of care, gross negligence, strict liability, negligence, breach of the warranty against redhibitory defects or vices, and intentional and willful conspiracy. But only the LPLA claims are permitted against NPC. Thus, as explained by the Eastern District in Jefferson v. Lead Indus., the other non-LPLA, even if based upon traditional principles of negligence, strict liability, or warranty, are not viable as independent theories.¹² Accordingly, all claims asserted against NPC, the manufacturer, save the specific LPLA claims should be dismissed.

¹² Jefferson v. Lead Indus. Ass’n, INPC, 930 F Supp. 241 (E.D. La. 1996)

III CONCLUSION

The plaintiffs sue NPC for personal injuries allegedly suffered from taking an over-the-counter cold medication, Tavist-D®. Their suit – claims against a manufacturer for injuries from the manufacturer's product – is governed by the Louisiana Products Liability Act. Under the LPLA, the plaintiffs are limited to four theories of recovery recognized by the act. All other claims must be dismissed.

| |
|--|
| <u>CERTIFICATE OF SERVICE</u> |
| I do hereby certify that I have on this day of <u>Sept</u> , 2002 served a copy of the foregoing pleading on counsel for all parties to this proceeding by hand delivery, U S Mail or facsimile transmission |
|  _____ ERIC R. NOWAK |

By: 
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Attorneys for Novartis Pharmaceuticals Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, ET AL.

CIVIL ACTION

NO.: 02-2436

VERSUS

JUDGE ENGELHARDT

BAYER CORPORATION, ET AL.

MAGISTRATE JUDGE SHUSHAN

NOTICE OF HEARING

PLEASE TAKE NOTICE, that defendant, Novartis Pharmaceuticals Corporation, through undersigned counsel will bring the attached Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted for hearing before the United States District Court for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, on the 2nd day of October 2002, at 9:30 a m

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of Sept., 2002 served a copy of the foregoing pleading on counsel for all parties to this proceeding by hand delivery, U S Mail or facsimile transmission

Eric R Nowak
ERIC R NOWAK

Respectfully submitted,

BY Eric R Nowak
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CASE: 2-02-cv-02436/P
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DATE: 09/09/02
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UNITED STATES DISTRICT COURT

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

EASTERN DISTRICT OF LOUISIANA

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DAPHINE B. DONNELLY, and
JEROM EDONNELLY, Husband

CIVIL ACTION NO. 02-2436

LOREITA G. WHYTE
CLERK

JUDGE ENGELHARDT

VERSUS

MAGISTRATE JUDGE SHUSHAN

BAYER CORPORATION; NOVARTIS
PHARMACEUTICALS
CORPORATION; NOVARTIS
CONSUMER HEALTH, INC.
4 LIFE RESEARCH, LC, Successor by
merger to SHAPERITE; SMOOTHIE
KING CO., INC.; SMOOTHIE KING
SYSTEMS, INC.; and WALGREENS
LOUISIANA CO., INC.
(D/B/A "WALGREENS")

* * * * *

MOTION TO REMAND

NOW INTO COURT, comes Daphne Donnelly and Jerome Donnelly, husband (hereinafter "plaintiffs"), by and through their counsel of record, and moves this Honorable Court to remand this action to the 34th Judicial District Court, Parish of St Bernard, Louisiana, on the ground that this Court lacks jurisdiction over this action. In support thereof, plaintiffs state as follows:

1

Plaintiffs initially filed suit in the 34th Judicial District Court, Parish of St Bernard, Louisiana on July 2, 2002, Civil Action Number 96,487 (See Petition, attached Exhibit "A") Service being requested on all local defendants at the time of filing. Service being had on out-of-state defendants via long arm statute on or about July 24, 2002. It is undisputed that defendants Walgreen Louisiana Company, Inc., Smoothie

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King Co , Inc , and Smoothie King Systems, Inc , are residents of the State of Louisiana Walgreens and both Smoothie King Co , Inc and Smoothie King Systems, Inc were joined in the suit by the plaintiffs because they sold over-the-counter products that contained Phenylpropanolamine (“PPA”) to plaintiff, Daphne Donnelly, which directly resulted in or substantially contributed to her suffering a stroke(s)

2

Defendants Bayer Corporation, Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc removed this action to the United States District Court for the Eastern District of Louisiana on or about August 7, 2002 (See Notice of Removal, attached Exhibit “B”) Defendants herein assert fraudulent joinder, alleging there is no possibility the plaintiff can recover against the retailer/seller defendants, Walgreen Louisiana Co , Inc , Smoothie King Co , Inc , and Smoothie King Systems, Inc

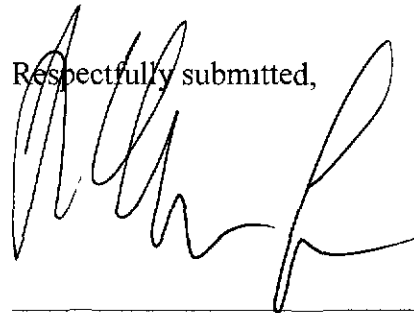
3

Defendants’ Notice of Removal is completely void of legal analysis Defendants’ simply state that plaintiffs “ cannot prevail on their claims against Walgreen Louisiana Co , Inc under Louisiana law” citing one case from the Western District of Washington Defendants’ then maintain that Smoothie King did not operate a store where plaintiff, Daphne Donnelly, purchased a PPA-containing product Defendants have failed in their burden to clearly and convincingly prove that plaintiff, under Louisiana law, is unable to prevail against the retailer/seller defendants Furthermore, Defendants completely ignore several other causes of actions alleged against the retailer/seller defendants Additional discovery is necessary to determine whether the Smoothie King defendants are proper parties in this action

The plaintiffs' petition clearly states arguable claims against both Walgreens and the Smoothie King defendants, which are Louisiana residents. Therefore, fraudulent joinder is not an issue. For these reasons set forth herein which are more fully articulated in the attached memorandum, diversity jurisdiction or any remaining grounds for federal jurisdiction over this matter do not exist. Accordingly, this case should be remanded to the 34th Judicial District Court, Parish of St. Bernard, Louisiana.

WHEREFORE, plaintiffs respectfully request that this Honorable Court issue an Order remanding this action to the 34th Judicial District Court, Parish of St. Bernard, Louisiana.

Respectfully submitted,



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in which plaintiff, Daphne Donnelly, seeks compensatory damages for injuries sustained as a direct result of consuming over-the-counter medications, including Shapefast®, Alka Seltzer Plus®, and Tavist-D®, which contained Phenylpropanolamine (“PPA”), and Jerome Donnelly, husband seeks damages for loss of consortium. The medication in question was used by millions of individuals throughout the years, including plaintiff, Daphne Donnelly, for treating cold and flu systems and sinus problems.

Unbeknownst to plaintiffs, PPA consumption increases the risk of stroke(s) and myocardial infarction(s). A recent study at Yale University brought this fact to light. However, the Yale study was preceded by various other research endeavors which reached similar conclusions. In the interest of public health, the Food and Drug Administration (“FDA”) formally requested that manufacturers of PPA containing products discontinue their marketing efforts. In particular, the FDA determined that any benefits gained from PPA usage did not outweigh the risk of harm, and furthermore concluded that PPA “cannot be considered to be safe for continued use.” For years preceding the Yale study and thereafter, though, the manufacturer and retailer defendants knew of the causal relationship between PPA usage and the risk of severe injury and even death. Plaintiff’s PPA consumption directly resulted in or substantially contributed to her suffering a stroke.

Retailer/seller defendants, Walgreen Louisiana Co., Inc., Smoothie King Co., Inc., and Smoothie King Systems, Inc., are undisputedly residents of Louisiana. The retailer/seller defendants were joined by the plaintiffs because they sold to plaintiff the PPA containing product which caused the injuries. As such, plaintiffs brought claims against the retailer/seller defendants based upon (1) breach of the warranty against

redhibitory defects, (2) failure to sell a product fit for its ordinary usage, (3) delivering a product not of the kind or quality specified by the seller, negligence, (4) negligence, (5) want of care, (6) gross negligence, (7) strict liability, and (8) intentional and willful conspiracy. In support of plaintiff's claims, it is further alleged that defendant knew or should have known of the unreasonably dangerous side-effects from consuming Shapefast®, Alka Seltzer Plus®, and Tavist-D® and was under a duty to disclose the risks inherent in the consumption thereof.

Defendants, Bayer Corporation, Novartis Pharmaceuticals Corporation, and Novartis Consumer Health, Inc. removed this action to the United States District Court for the Eastern District of Louisiana on or about August 7, 2002. As grounds for removal, Defendants claim that diversity jurisdiction exists over this matter because plaintiff fraudulently joined Walgreens, and further that Smoothie King did not operate a store where plaintiff purchased the PPA-containing product. Defendants erroneously allege that both Walgreens and Smoothie King should be disregarded creating diversity of citizenship in the remaining parties. Defendants also erroneously allege that the non-diverse defendant, Walgreens, was fraudulently joined implying that plaintiffs have no possibility of recovering against it for any of the claims made in the petitions.

A. Plaintiff Has Alleged a Viable Cause of Action And Has Sought Appropriate Relief Thereto

Defendants skeletal Notice of Removal simply states that Plaintiffs “cannot prevail on their claims against Walgreen Louisiana Co., Inc. under Louisiana law” citing *Perksin v. Bayer Corporation, et al.* A case which was originally filed in Caddo Parish and removed to the Western District of Louisiana before being transferred to the MDL 1407, *In re Phenylpropanolamine*. In *Perksin*, Judge Rothstein, of the Western District of

Washington, MDL 1407, *In re Phenylpropanolamine*, denied Plaintiffs Motion to Remand *Perksin vs Bayer Corporation, et al*, No 01-2023R (W D Wash Feb 26, 2002) In *Perksin*, the plaintiffs alleged only two causes of action, breach of warranty of redhibition and negligence, furthermore, the plaintiffs only cite article 2545 in the petition In the Order, the court appears to place a vast amount of emphasis on this issue, stating that the “plaintiffs have made only conclusory allegations that would not support remand” *Id* Defendants, by citing this Order in *Perksin*, mislead the Court by implying that plaintiffs have failed to state a cause of action in redhibition (See Notice of Removal at ¶9, p 3, attached hereto as Exhibit “B”) “The action of redhibition is based upon the breach of the *seller's* obligation of warranty against hidden defects in a thing sold or its redhibitory vices” *A Tillman v Davidson*, 501 So 2d 1067 (La App 2 Cir 1987) (*italics original*) Plaintiff has clearly alleged that the retailer/seller defendants sold the PPA products which caused her injury (See Petition ¶9, p 3, attached hereto as Exhibit “A”) Moreover, “[A] seller who knows that the thing he sells has a defect but omits to declare it is liable to the buyer for damages” See La Civ Code art 2545 According to the plaintiffs’ petition, Defendants [including Walgreens] were aware of the causal relationship between PPA use and the injuries complained Therefore, according to plaintiffs, defendants are bad faith sellers

In the present case, evidence will be exchanged during discovery and likewise be presented during trial which proves that defendants knowingly concealed that its PPA containing products which were potentially unsafe for human consumption It is a well-settled principle that, “[F]raud may result from silence or inaction” *Boos v Benson Jeep-Eagle Company*, 98-1424 (La App 4 Cir 6/24/98),

717 So 2d 661, 667, see also La Civ Code art 1953 In sum, the petition alleges that the defendants knew about the hazardous adverse side effects of PPA (See Petition ¶17(1), p 5, ¶15, p 6 (inadvertently repeated number on page 6) and, ¶16, p 6 (inadvertently repeated number on page 6), attached hereto as Exhibit "A")

This matter has previously been addressed by this District Court In *Mosely et al v Bayer Corporation, et al*, No 01-3479 (Lemelle, J, E D La January 18, 2000), plaintiff alleged that he purchased, and suffered a stroke after consuming Alka Seltzer Plus® and Dimetapp®, both PPA containing products Plaintiff filed suit against the drug manufacturers, including Bayer Corporation, and the seller of the products, K&B Louisiana Corporation ("K&B") Defendants removed the action to federal court alleging K&B was fraudulently joined Plaintiffs then moved for remand, claiming it was possible to recover in a Louisiana state forum against local retailer, K&B

This Court, on page 6 of the *Mosely* opinion, ultimately ruled, "[T]hus, there is a possibility that Plaintiffs could recover against Defendant K&B/Rite Aid and removal was improper." (emphasis added) (See Opinion, attached hereto as Exhibit "C") Accordingly, the *Mosely* case was remanded to its state court of origin, the Civil District Court for the Parish of Orleans The Courts have granted remands in other such cases on the same or similar basis See also, *Modesta St Amant, et al v Bayer Corporation, et al*, No 01-3421 (Lemmon, M, E D La March 4, 2002), *Jacqueline Coleman v Bayer Corporation, et al*, No 02-333 (Barbier, C, E D La April 3, 2002) See Opinions, attached hereto as Exhibits "D" and "E", consecutively)

In the case sub judice, plaintiffs allege that all defendants in this case knew or had reason to know of the adverse effects of the PPA containing products they sold and/or manufactured. Despite this, defendants imply that the petition fails to adequately allege Walgreen Louisiana Co., Inc. had knowledge. A review of the factual allegations in the petition, though, indicate otherwise. Plaintiff alleges that PPA causes life threatening adverse side effects which has been well documented and known to defendants. (See Petition, ¶6, p. 2, ¶7, p. 3, ¶17, p. 5-6, ¶15, p. 6 (inadvertently repeated number on page 6), ¶16, p. 6 (inadvertently repeated number on page 6), attached hereto as Exhibit "A") Based on these factual allegations in plaintiff's petition, it is implausible that the retailer had no knowledge of the hazardous nature of the PPA products they sold. According to the Fourth Circuit Court of Appeal

[w]here documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness's story, the court of appeal may manifest error or clear wrongness even in a finding based on a credibility determination

Garner v. Louisiana Housing, 2000-2226 (La App. 4 Cir. 9/26/01), 798 So.2d 295, 299. Suffice it to say, the evidence at hand indicates that the retailer/seller defendants possessed industry knowledge of, or at the very least had attained constructive knowledge pertaining to, PPA's adverse side-effects at the time plaintiff, Daphne Donnelly, purchased the PPA containing product.

Moreover, defendants fail to even tender a scintilla of evidence in support of its proposition that the retailer/seller defendants had no knowledge of the hidden defects in their products, despite its affirmative duty to do so. **"...[a] seller ha[s] the burden of proving that there was no issue of fact as to his actual knowledge of a defect or as to**

his constructive knowledge of a defect (that he should have known of the defect) *Hooper v Crown, et al*, 560 So 2d 890 (La App 1st Cir 1990) (citations omitted) (emphasis added) There is no evidence presented to the Court to support that Walgreens did not know of PPA's adverse effects, in the alternative, however, the evidence on hand indicates that they knew or should have known. The defendants have not met their burden.

Louisiana law recognizes that a seller/retailer may be held liable under a negligence theory. In *Ross v John's Bargain Stores Corp*, 464 F 2d 111 (5th Cir 1972), the Fifth Circuit Court of Appeal, citing authority from various jurisdictions, opined that negligence may be imputed against a seller of a product which it knew or should have known was dangerous. The Court found that whether the defendants knew or should have known of the dangerous nature of the product it sold to the plaintiff is a question left to the trier of fact. *Id* at 116. Therefore, plaintiff's negligence claims against the local retailer/seller defendant are legally viable, and the case should be remanded to state court.

B. Defendants Have Failed To Meet Their Burden of Proof

The burden of establishing federal jurisdiction is placed on the party seeking removal. The removal statute is strictly construed against removal jurisdiction. *Pacheco de Perez v AT&T Co*, 139 F 3d 1368, 1373 (11th Cir 1998). Where a defendant removes a case alleging fraudulent joinder, "[t]he removing party has the burden of proving that either (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant, or (2) there is an outright fraud in the Plaintiff's pleading of jurisdictional facts." *Crowe v Coleman*, 113 F 3d 1536, 1538 (11th Cir 1997), *Coker v Amoco Oil, Co*, 709 F 2d 1453, 1440 (11th Cir 1983), see also *Badon v R J Nabisco*, 236 F 3d 282

(5th Cir 2000) “The burden of the removing party is a ‘heavy one’ ” *Crowe*, 113 F 3d at 1538 (citing *B, Inc v Miller Brewing Co* , 663 F 2d 545, 549 (5th Cir Unit A, 1981) A claim by one of the Defendants that joinder is fraudulent must be asserted with particularity and supported by clear and convincing evidence See *Parks v New York Times Co* , 308 F 2d 474, 478 (5th Cir 1962)

In a case where the defendants contend fraudulent joinder, the court must consider the state law upon which the claim rests and then determine only whether there is any reasonable possibility that the relevant state’s highest court would rule in favor of the plaintiff were the issue presented to it The court is not to weigh the merits of the plaintiff’s claims beyond determining whether they are **arguable claims** under state law *Crowe*, 113 F 3d at 1538 (emphasis added) “To establish fraudulent joinder, the party crying foul must show there is no reasonable probability of recovery against the joined party or that there has been outright fraud in the pleadings of jurisdictional facts ” *Delgado v Shell Oil Co* , 663 F 2d 545, 549 (5th Cir 1981) The court shall evaluate the factual allegations in the light most favorable to the plaintiff, and the court must resolve any uncertainties about state substantive law in favor of the plaintiff *Crowe*, 113 F 3d at 1538 The federal court is to make these determinations based on the plaintiff’s pleadings at the time of removal *Id* Joinder of a defendant is not fraudulent simply because a motive is to defeat diversity *Id* Where the plaintiff’s allegations set forth a good faith claim under state law, no matter how doubtful, the presence of the non-diverse defendant will prevent removal *Id* See also *Tedder v FMC Corp* , 590 F 2d 115, 116-117 (5th Cir 1979) Therefore, to prevail, defendants must clearly and convincingly show

that there is no possibility that plaintiffs have stated arguable claims against the local retailer defendant.

Plaintiff in the instant action has alleged that Walgreens and the Smoothie King defendants had knowledge of the dangerous side effects of PPA and stated facts, which as perceived in the light most favorable to plaintiff, give rise to a viable cause of action in redhibition.

C. Plaintiff has Further Stated Arguable Claims Against the Retailer/Seller Defendant for Failing to Sell a Product Fit for its Ordinary Usage; Failing to Deliver a Product of the Kind Specified by the Seller; and Negligence, Want of Care, Gross Negligence, and/or Strict Liability

Furthermore, defendants, in their haste to remove this action, have completely ignored several causes of action alleged against the retailer/seller defendant. The plaintiff allege that the retailer/seller defendants are liable for failing to deliver a product of the kind specified by the seller, failing to sell a product fit for its ordinary usage, negligence, want of care, gross negligence, and/or strict liability. Defendants avoid mention of these viable theories of recovery, omitting any argument why plaintiffs can not state or establish any of these claims against the retailer/seller defendants under Louisiana law. Defendants ignore the presence of these causes of action in the petition at its own peril. As the law of fraudulent joinder clearly provides, the defendant must show "clearly and convincingly" that the plaintiff has no possibility of establishing any cause of action against the resident defendants. Defendants have failed to meet its burden of establishing fraudulent joinder.

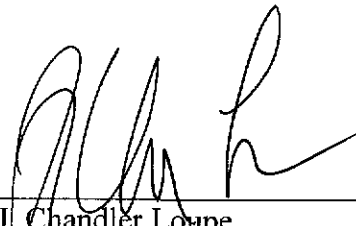
D. Further Discovery Is Necessary To Determine Whether Smoothie King Co., Inc. and Smoothie King Systems, Inc. Are Appropriate Defendants In Said Action

Defendants have stated that all Smoothie King defendants are fraudulently joined and further, that Smoothie King did not operate any store where plaintiff purchased the PPA-containing products. Plaintiffs' incorporate all the above and foregoing arguments as if set out below. Plaintiffs' submit that further discovery is necessary regarding this issue. Even so, as Walgreen Louisiana Co., Inc. was not fraudulently joined, this renders the case non-diverse thus making state court the proper forum.

II. Conclusion

It is clear that the defendants failed to carry its burden in demonstrating that there is no possibility that a state court would find that plaintiff's petition fails to state any cause of action against the retailer/seller defendants. Plaintiffs' joinder of the defendants were therefore proper. Clearly, federal jurisdiction based on diversity is not present, therefore, this action should be remanded to the 34th Judicial District Court, Parish of St. Bernard, Louisiana.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10 day of September, 2002, served a copy of the foregoing by mailing same by United States mail, first class postage prepaid, properly addresses to the following

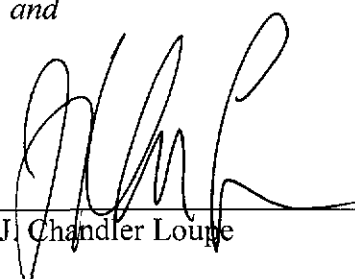
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*Attorneys for Smoothie King Co , Inc and
Smoothie King Systems, Inc*



J. Chandler Louie

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, and
JEROM EDONNELLY, Husband

VERSUS

BAYER CORPORATION; NOVARTIS
PHARMACEUTICALS
CORPORATION; NOVARTIS
CONSUMER HEALTH, INC.
4 LIFE RESEARCH, LC, Successor by
merger to SHAPERITE; SMOOTHIE
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SYSTEMS, INC.; and WALGREENS
LOUISIANA CO., INC.
(D/B/A "WALGREENS")

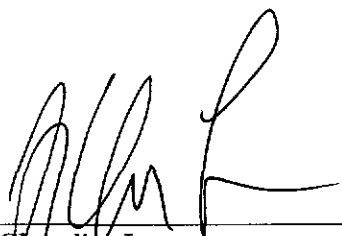
* * * * *

* CIVIL ACTION NO. 02-2436
*
* JUDGE ENGELHARDT
*
* MAGISTRATE JUDGE SHUSHAN

NOTICE OF HEARING

PLEASE TAKE NOTICE that Plaintiffs' **Motion to Remand** has been set for hearing on the 2nd day of October, 2002 at 9 30 o'clock a m , before Judge Lurt D Engelhardt at the United States District Courthouse for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana

Respectfully submitted,



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J Chandler Loupe

34TH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD

STATE OF LOUISIANA

No. 56 487

DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband
Plaintiff

vs.

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, Successor by merger to SHAPERITE;
SMOOTHIE KING CO., INC.;
SMOOTHIE KING SYSTEMS, INC.; and
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")
Defendants

DIVISION **C**

SECTION

FILED

JUL 02 2002
10:00 AM

Debra L. Jones
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT comes Petitioner, DAPHINE B. DONNELLY, a person of the full age of majority, and respectfully represents the following

1. Petitioner, Daphine B. Donnelly, is a person of full age and majority and is a resident and domiciliary of St. Bernard Parish, State of Louisiana.
2. Made pharmaceutical manufacturer defendants herein are:
 - A. Bayer Corporation is an Indiana Corporation with its principal place of business in Pennsylvania, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.
 - B. Novartis Pharmaceuticals Corporation is a Delaware corporation with its principal place of business in New Jersey, regularly selling and advertising its product in the City of Chalmette, State of Louisiana
 - C. Novartis Consumer Health, Inc. a Delaware corporation with its principal place of business in New Jersey, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.
 - D. 4Life Research, LC, successor in merger to Shaperite, a limited liability company established in Utah. 4Life Research, on information and belief, manufactured and distributed



Shapefast®, thus bringing this action against 4Life Research, LC as a manufacturing defendant and as a seller/retailer defendant, regularly selling and advertising in the City of Chalmette, State of Louisiana

3 Made retailer/seller defendants herein are

A Smoothie King Co , Inc , a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator.

B Smoothie King Systems, Inc , a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator

C. Walgreen Louisiana Co , Inc. (D/B/A "Walgreens"), a corporation organized in the State of Louisiana and licensed to and doing business in this state, with its principal place of business in Metairie, Louisiana, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.

4. Defendants are liable jointly and *in solido* unto Petitioner for an amount as is reasonable under the circumstances, for all costs and expert fees of these proceedings, for judicial interest from the date of demand, and for all and equitable relief for the following

5. Phenylpropanolamine (hereinafter "PPA")/ephedrine was an ingredient used in many over-the-counter and prescription cold medications, it was also used in many over-the-counter weight loss product.

6 Life threatening adverse effects related to PPA/ephedrine leading to hospitalization and/or death have been well documented and known to pharmaceutical companies for decades These life threatening events have been documented through the Food and Drug Administration (hereinafter referred to as FDA) warning/sentinel events systems, showing a large number of such events related to PPA/ephedrine. Several life threatening PPA/ephedrine injuries have been reported in Clin-Alert and other medical reports A recent study published by Yale University which concluded that PPA causes hemorrhagic strokes and also found an ingredient "Norephedrine", an active ingredient in PPA, is also found in ephedrine dietary supplements In addition, PPA/ephedrine is known to cause other serious adverse effects including heart damage and myocardial infarction

Defendant manufacturers have concealed material facts, including the serious risks associated with ingesting PPA/ephedrine, from Petitioner in product packaging, labeling, advertising, promotional campaigns and materials, among other ways, regarding the safety and use of products containing PPA/ephedrine

8 The causal relationship of Petitioner's injury to the products containing PPA/ephedrine were inherently undiscoverable by the Petitioner until she was warned of the dangers by the defendants and/or others. Petitioner did not discover, nor through the exercise of reasonable care and diligence could she have discovered that her injury and illness was in anyway related to products containing PPA/ephedrine until at the earliest when Petitioner was made aware that many PPA containing drugs were withdrawn from the market, and further, that ephedrine contains many of the same ingredients and has been linked to many injuries and deaths relating to its ingestion, just as with PPA-containing products

9 Petitioner purchased and/or ingested PPA/ephedrine containing product within all times relevant times, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®. Petitioner purchased Shapefast® at Smoothie King a nutritional/retail store located in the City of Chalmette, State of Louisiana. Petitioner purchased Alka Seltzer Plus® and Tavist-D® at Walgreens, a pharmaceutical/retail store located in the City of Chalmette, State of Louisiana.

10 Petitioner herein has suffered and still suffers serious and grievous injuries as a result of ingesting PPA/ephedrine containing products. On or about January 12, 1991, suffered from a stroke in Chalmette, Louisiana and was taken to Pendleton Methodist Memorial Hospital in New Orleans, Louisiana. Petitioner suffered from, including, but not limited to, paralysis to the right side of her body.

11. Petitioner avers that the sole and proximate cause of Petitioner's injury was her consumption of the above-referenced PPA/ephedrine-containing products, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®, and that she did not become aware of the causal link between the consumption of PPA/ephedrine-containing products and these health risks and injuries until recently.

12. As a direct and consequential result of the foregoing, Petitioner has sustained physical and mental pain and suffering, loss of income, loss of consortium, loss of enjoyment of life, and

other damages to be shown at trial. All of the foregoing damages are past, present and future

13 Petitioner, Jerome Donnelly, husband of Daphne Donnelly, has suffered, sustained, and
incurred injuries as a result of his spouse's debilitating and impaired condition. Petitioner
has suffered loss of consortium in the past and will sustain, in reasonable medical
probability, a loss of consortium claim in the future

14 The incident and any resultant damages occurred through no fault or negligence on the part
of the Petitioner

15 The incident and any and all resultant injuries and damages to Petitioner occurred through the
fault of the pharmaceutical manufacturer defendants, as manufacturers of the product which
contained PPA/ephedrine, in the following non-exclusive particulars

1) Pharmaceutical manufacturer defendants are liable under the Louisiana Products
Liability Act, Louisiana Revised Statutes Annotated 9:2800.51 *et seq*

a.) Pharmaceutical manufacturer defendants manufactured products which were
unreasonably dangerous in design at the time the product left the
manufacturers' control and such defects in design were the proximate cause
of damages suffered by Petitioner. The products were ingested and taken as
intended.

b.) Pharmaceutical manufacturer defendants failed to employ alternative designs
which would have reduced, if not prevented Petitioner's damages, and their
failure to employ alternative designs was a proximate cause of the damages
suffered by Petitioner

c.) Pharmaceutical manufacturer defendants failed to adopt alternative designs
for their products and they knew of the likelihood that its products' design
would cause Petitioner's injuries; and defendants knew the gravity of the
potential injuries outweighed the utility of their products

d.) Petitioner specifically alleges that an alternative design of pharmaceutical
manufacturer defendants' products would have nullified, or substantially
reduced the injuries Petitioner suffered

e.) Pharmaceutical manufacturer defendants failed to post suitable and adequate
warning(s) or instruction(s) concerning the risks of their products, including,

but not limited to, adequately warning potential users of the medication's known adverse side-effects, including heart problems and strokes, and any and all other side-effects suffered by Petitioner

- f) Pharmaceutical manufacturer defendants failed to alert users, potential users, and retail dealers who would be expected to sell and/or recommend its products, of the hazards associated with said products' usage, and further actively promoted and advertised their products in a manner that suggested the design of their products was safe

16. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability of pharmaceutical manufacturer defendants by their failure to exercise reasonable care in the manufacture of its products when they knew or should have known that Petitioner was a foreseeable and intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed to protect intended users of their products.

17. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault of defendants, as sellers and/or retailers of the product which contained PPA/ephedrine, rendering retailer/seller defendants liable for any and all damages suffered by Petitioner, including attorney fees, in the following non-exclusive particulars:

- 1) Retailer/seller defendants are liable for breach of the warranty against redhibitory defects, or vices, in the subject over-the-counter medications, existing at the time of the sale to Petitioner, pursuant to La. Civ Code Article 2520 *et seq.*
 - a) Retailer/seller defendants failed to give Petitioner notice of the dangerous side-effects of the subject over-the-counter medications they sold to Petitioner which contained PPA/ephedrine; and retailer/seller defendants had actual knowledge of the existence of said redhibitory defects at the time of the sale
- 2) Retailer/seller defendants are liable under La. Civ Code Article 2524 for failure to sell a product fit for its ordinary usage.
 - a.) Retailer/seller defendants knew Petitioner's intended usage of the subject over-the-counter medications and knew of Petitioner's reliance on the skill and

judgment of retailer/seller defendants in the sale of their over-the-counter medications. Retailer/seller defendants failed to exercise the a propnate skill of judgment in the sale of their products to Petitioner.

3) Retailer/seller defendants are liable under La. Civ. Code Article 2529 for delivering products not of the kind or quality specified by the seller.

a.) Retailer/seller defendants sold over-the-counter medications to Petitioner which were misrepresented by retailer/seller defendants as being safe for human consumption. Retailer/seller defendant failed to adequately inform Petitioner of the dangers inherent in the over-the-counter medications they sold to Petitioner.

15 The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability retailer/seller defendants by their failure to exercise reasonable care in the sale and/or retail of its products when it knew, or should have known, that Petitioner was a buyer and a foreseeable intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed by retailer/seller defendants to protect intended buyers and users of the subject products.

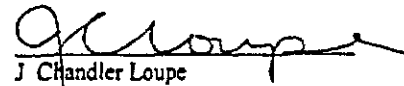
16 Pharmaceutical manufacturer defendants and retailer/seller defendants are liable *in solido* for intentional and willful conspiracy pursuant to La. Civ. Code Article 2324. Defendants, among themselves, conspired with one another to conceal material facts including the hazardous nature of the subject product they manufactured and sold to the public in general and Petitioner. Defendants knew that the injuries suffered by Petitioner were substantially certain to occur through the consumption and ingestion of the over-the-counter medication they manufactured and sold.

17. Venue for this action arises under Louisiana Code of Civ. Pro. Articles 42 *et seq.*, as the wrongful conduct of defendants complained of herein occurred in the Parish of St. Bernard. Petitioner purchased and suffered her injuries in St. Bernard Parish, State of Louisiana.

WHEREFORE, Petitioner prays that after due proceedings be had there be a judgment rendered herein in favor of Petitioner and against defendants jointly, severally, and *in solido*, for such damages as are reasonable in the premises, together with the maximum legal interest from the date of judicial demand, until paid, for all costs of these proceedings,

and for all other general and equitable relief to which Petitioner may be awarded Petitioner respectfully requests a TRIAL BY JURY

Respectfully submitted,


J. Chandler Loupe
CLAITOR & LOUPR, LLC
STATE BAR NO 19955
2223 Quail Run Drive, Ste G
Baton Rouge, LA 70808
(225) 767-2222 (Telephone)
(225) 767-9003 (Facsimile)

KIRK LAW FIRM
Dana Kirk
MS STATE BAR NO. 100188
TX STATE BAR NO 11057500
4265 San Felipe Street, Ste. 1400
Houston, TX 77027
(713) 651-0050

CLARK, DEPEW & TRACEY, LTD., L.L.P.
Clayton Clark
TX STATE BAR NO. 04275750
440 Louisiana Street, Ste. 1600
Houston, TX 77002
(713) 757-1400

J. ROBERT DAVIS LAW FIRM
J. Robert Davis
TX STATE BA NO. 00788859
440 Louisiana Street, Ste. 1600
Houston, TX 77002
(713) 425-5255

PLEASE SERVE:

BAYER CORPORATION
By and Through its Registered Agent for Service of Process:
CT Corporation System
8550 United Plaza Blvd.
Baton Rouge, LA 70809

NOVARTIS PHARMACEUTICAL CORPORATION
By and Through its Registered Agent for Service of Process:
320 Somerulos Street
Baton Rouge, LA 70802

NOVARTIS CONSUMER HEALTH, INC
By and Through its Registered Agent for Service of Process.
Corporation Service Company
2711 Centerville Road, Ste. 400
Wilmington, DE 19808

A TRUE COPY

Lena R. Tates
CLERK OF COURT
PARISH OF ST BERNARD
STATE OF LOUISIANA

By 
DEPUTY CLERK
/S/ SUSAN A. RANDAZZO

4LIFE RESEARCH, LC
By and Through its Registered Agent for Service of Process
David Lisonbee
9850 S 300 W.
Sandy, UT 840703262

SMOOTHIE KING CO , INC
By and Through its Registered Agent for Service of Process
Stephen Kuhnau, Sr
2400 Veterans Blvd , Ste 110
Kenner, LA 70062

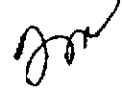
SMOOTHIE KING SYSTEMS, INC
By and Through its Registered Agent for Service of Process:
Stephen Kuhnau, Sr.
2400 Veterans Blvd , Ste. 110
Kenner, LA 70062

WALGREEN LOUISIANA CO., INC.
By and Through its Registered Agent for Service of Process:
The Prentice-Hall Corporation System, Inc.
701 South Peters Street, Second Floor
New Orleans, LA 70130

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.

2002 AUG -7 AM 11:52

LORETTA G. WHYTE
CLERK



UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION; NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC.,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO, INC, SMOOTHIE KING SYSTEMS,
INC, and WALGREEN LOUISIANA CO,
INC (D/B/A "WALGREENS")

* CIVIL ACTION

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NO **02-2436**

SECTION

MAGISTRATE **SECT N MAG. 1**

NOTICE OF REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA:

NOW INTO COURT, through undersigned counsel, come Bayer Corporation,
Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc, who
respectfully aver

1. Bayer Corporation, Novartis Pharmaceuticals Corporation and Novartis
Consumer Health, Inc are named defendants in a civil suit filed in the Thirty-Fourth
Judicial District Court for the Parish of St. Bernard, State of Louisiana, entitled "Daphne B.

Bayer_Donnelly Notice of Removal DOC



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File
Rm/Dep
c No

Donnelly, and Jerome Donnelly, Husband vs Bayer Corporation, Novartis Pharmaceuticals Corporation; Novartis Consumer Health, Inc, 4Life Research, LC, Successor by merger to Shaperite, Smoothie King Co., Inc, Smoothie King Systems, Inc; and Walgreen Louisiana Co, Inc (d/b/a "Walgreens") and bearing No. 96-487-C on the docket of that court. Plaintiffs filed their original Petition on July 2, 2002. Copies of the State Court proceedings are attached to this Notice of Removal and constitute all process, pleadings and orders served on the petitioners to date in this suit.

2 This suit is an action in which the Court has original jurisdiction under 28 U.S.C. §1332, as there is complete diversity of citizenship between plaintiffs and the defendants and the matter in controversy exceeds \$75,000.00, exclusive of interest and costs. Thus, this action may be removed to this Court pursuant to the provisions of 28 U.S.C. §1441.

3 The forum state is Louisiana. The plaintiffs were, at the time they filed this action, and still are citizens of the State of Louisiana.

4 Bayer Corporation was, at the time the action was filed, and still is a corporation incorporated in the State of Indiana, with its principal place of business in the State of Pennsylvania. Bayer Corporation was not, at the time this action was filed and still is not a citizen of the State of Louisiana.

5. Novartis Pharmaceuticals Corporation was, at the time the action was filed, and still is a corporation incorporated in the State of Delaware, with its principal place of business in the State of New Jersey. Novartis Pharmaceuticals Corporation was not, at the time this action was filed and still is not a citizen of the State of Louisiana.

6 Novartis Consumer Health, Inc was, at the time the action was filed, and still is a corporation incorporated in the State of Delaware, with its principal place of business in the State of New Jersey Novartis Consumer Health, Inc was not, at the time this action was filed and still is not a citizen of the State of Louisiana

7 Plaintiff has named 4Life Research, LC as a defendant On information and belief, 4Life Research, LC is a limited liability company organized in the State of Utah, with its principal place of business in Utah. The members of 4Life Research, LC are David Lisonbee and Bianca Lisonbee, both of whom are citizens of the state of Utah David Lisonbee and Bianca Lisonbee were not at the time this action was filed and still are not citizens of the state of Louisiana

8. Complete diversity of citizenship exists in this case because the non-diverse defendants, i.e., Smoothie King Co, Inc, Smoothie King Systems, Inc and Walgreen Louisiana Co, Inc have been fraudulently joined. *See, e.g., Borden v General Dynamics Corp*, 60 F3d 213, 217 (5th Cir 1995) When the citizenship of the fraudulently joined party is disregarded, there is complete diversity of citizenship between the plaintiff and the remaining defendants.

9 Plaintiffs fraudulently joined Walgreen Louisiana Co, Inc. They assert claims based on strict liability, negligence, redhibition, fraud, negligent and reckless misrepresentation, and conspiracy to defraud against this defendant. (See Original Petition, ¶¶ 17-18) However, they cannot prevail on their claims against Walgreen Louisiana Co, Inc. under Louisiana law. *See, e.g., Perkins v Bayer Corp., et al*, No. C01-2033R (W.D. Wash Feb 26, 2002).

10 Plaintiffs fraudulently joined Smoothie King Co , Inc. and Smoothie King Systems, Inc Cf *Perksin v Bayer Corp , et al*, No C01-2033R (W D Wash Feb 26, 2002) Additionally, plaintiff Daphne Donnelly alleges that she suffered a stroke on or about January 12, 1991 allegedly as a result of ingestion of products containing phenylpropanolamine (PPA) and/or ephedrine that she allegedly purchased at a Smoothie King store in Chalmette, Louisiana Smoothie King did not operate any store in Chalmette on or before January 12, 1991 (see Affidavit of Steve Kuhnau attached as Exhibit A)

11 It is apparent from the face of plaintiff's Petition that the amount in controversy between the plaintiff and defendants exceeds \$75,000 00, exclusive of interest and costs See, e g , *Gebbia v Wal-Mart Stores, Inc* , 233 F 3d 880 (5th Cir 2000) Plaintiff Daphne B Donnelly alleges that she suffered a stroke resulting in paralysis to the right side of her body (See Petition at ¶ 10) Cf. *Philippe v. Lloyd's Aero Boliviano*, 97-0258 (La App 1st Cir 2/20/98), 710 So 2d 807 (trial court awarded total damages of \$1,168,320 09 for stroke injuries to plaintiff and for loss of consortium to his wife, the Appeals Court later reversed finding no liability), *Smith v. Cameron Crews, Inc* , 348 So 2d 179 (La App 3d Cir 1977) (affirming award of \$150,000 00 to plaintiff who suffered stroke as a result of defendant's negligence)

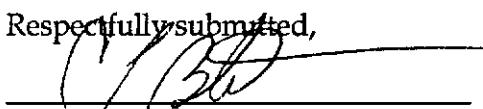
12 This Court has supplemental jurisdiction under 28 U.S.C § 1367 over Jerome Donnelly's loss of consortium claim See *Booty v Shoney's, Inc* , 872 F Supp 1524 (E.D La 1995)

13. 4Life Research consents to this Notice of Removal See letter attached as Exhibit B


14 Petitioners file this Notice of Removal within 30 days of July 9, 2002, the earliest date of service on any defendant Petitioners file this Notice of Removal without waiving any objections, exceptions or defenses to plaintiffs' Petition

15 Petitioners file and present herewith the sum of \$150.00 as required by Title 28, United States Code, § 1446.

Respectfully submitted,



Mary E. Meyer (La. Bar No. 19966)
John F. Olinde (La. Bar No. 1515)
Charles P. Blanchard (La. Bar No. 18798)
**CHAFFE, McCALL, PHILLIPS,
TOLER & SARP, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone No. (504) 585-7000
Attorneys for Bayer Corporation



Joy G. Braun (#3416)
Eric R. Nowak (#27025)
Shirley E. Harrell (#27495)
SESSIONS, FISHMAN & NATHAN, L.L.P.
201 St. Charles Avenue, Suite 3500
New Orleans, LA 70170
Telephone (504) 582-1500
**Attorneys for Novartis Pharmaceuticals
Corporation and Novartis Consumer Health,
Inc.**

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 7th day of August, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.



THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

CITATION

NO. 96-487

DAPHINE B. DONNELLY, AND EROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION, NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE;
SMOOTHIE KING CO.; SMOOTHIE KING SYSTEMS, INC.;
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

TO: BAYER CORPORATION
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
CT CORPORATION SYSTEM
8550 UNITED PLAZA BLVD.
BATON ROUGE, LOUISIANA

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for Damages. The Petition tells you what you are being sued for.

You must either DO WHAT THE PETITION ASKS, OR WITHIN FIFTEEN (15) DAYS after you have received these documents, you must file an answer or other legal pleadings in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W St Bernard Hwy, Chalmette, LA 70043.

If you do not do what the Petition asks, or if you do not file an answer or legal pleading within FIFTEEN (15) DAYS, a judgment may be entered against you without further notice.

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the 2nd day of July, 2002.

ssr P1

LENA R. TORRES
CLERK OF COURT

BY *Susan A. Randazzo*
Deputy Clerk /S/ SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ this Parish in the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with this service I learned by interrogating the same _____ the said _____ being absent from _____ domicile at the time of said service.

Returned Parish of St. Bernard _____, 2002

Sheriff

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ on _____ at _____ this Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to in _____ Returned Parish of St. Bernard _____, 2002

Sheriff

34TH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD

STATE OF LOUISIANA

No. 56 487

**DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband**
Plaintiff

vs.

**BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, Successor by merger to SHAPERITE;
SMOOTHIE KING CO., INC.;
SMOOTHIE KING SYSTEMS, INC.; and
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")**
Defendants

DIVISION **C**

SECTION _____

FILED

JUL 02 2002

10:10 AM

Debra L. Carter
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT comes Petitioner, DAPHINE B. DONNELLY, a person of the full age of majority, and respectfully represents the following:

1. Petitioner, Daphine B. Donnelly, is a person of full age and majority and is a resident and domiciliary of St. Bernard Parish, State of Louisiana.
2. Made pharmaceutical manufacturer defendants herein are:
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 - D. 4Life Research, LC, successor in merger to Shaperite, a limited liability company established in Utah. 4Life Research, on information and belief, manufactured and distributed

Shapefast®, thus bringing this action against 4Life Research, LC as a manufacturing defendant and as a seller/retailer defendant, regularly selling and advertising in the City of Chalmette, State of Louisiana

3. Made retailer/seller defendants herein are

A. Smoothie King Co , Inc , a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator.

B. Smoothie King Systems, Inc , a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator.

C. Walgreen Louisiana Co , Inc. (D/B/A "Walgreens"), a corporation organized in the State of Louisiana and licensed to and doing business in this state, with its principal place of business in Metairie, Louisiana, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.

4. Defendants are liable jointly and *in solido* unto Petitioner for an amount as is reasonable under the circumstances, for all costs and expert fees of these proceedings, for judicial interest from the date of demand, and for all and equitable relief for the following:

5. Phenylpropanolamine (hereinafter "PPA")/ephedrine was an ingredient used in many over-the-counter and prescription cold medications, it was also used in many over-the-counter weight loss product.

6. Life threatening adverse effects related to PPA/ephedrine leading to hospitalization and/or death have been well documented and known to pharmaceutical companies for decades. These life threatening events have been documented through the Food and Drug Administration (hereinafter referred to as FDA) warning/sentinel events systems, showing a large number of such events related to PPA/ephedrine. Several life threatening PPA/ephedrine injuries have been reported in Clin-Alert and other medical reports. A recent study published by Yale University which concluded that PPA causes hemorrhagic strokes and also found an ingredient "Norephedrine", an active ingredient in PPA, is also found in ephedrine dietary supplements. In addition, PPA/ephedrine is known to cause other serious adverse effects including heart damage and myocardial infarction.

Defendant manufacturers have concealed material facts, including the serious risks associated with ingesting PPA/ephedrine, from Petitioner in product packaging, labeling, advertising, promotional campaigns and materials, among other ways, regarding the safety and use of products containing PPA/ephedrine

- 8 The causal relationship of Petitioner's injury to the products containing PPA/ephedrine were inherently undiscoverable by the Petitioner until she was warned of the dangers by the defendants and/or others. Petitioner did not discover, nor through the exercise of reasonable care and diligence could she have discovered that her injury and illness was in anyway related to products containing PPA/ephedrine until at the earliest when Petitioner was made aware that many PPA containing drugs were withdrawn from the market, and further, that ephedrine contains many of the same ingredients and has been linked to many injuries and deaths relating to its ingestion, just as with PPA-containing products..
9. Petitioner purchased and/or ingested PPA/ephedrine containing product within all times relevant times, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®. Petitioner purchased Shapefast® at Smoothie King a nutritional/retail store located in the City of Chalmette, State of Louisiana. Petitioner purchased Alka Seltzer Plus® and Tavist-D® at Walgreens, a pharmaceutical/retail store located in the City of Chalmette, State of Louisiana.
10. Petitioner herein has suffered and still suffers serious and grievous injuries as a result of ingesting PPA/ephedrine containing products. On or about January 12, 1991, suffered from a stroke in Chalmette, Louisiana and was taken to Pendleton Methodist Memorial Hospital in New Orleans, Louisiana. Petitioner suffered from, including, but not limited to, paralysis to the right side of her body.
11. Petitioner avers that the sole and proximate cause of Petitioner's injury was her consumption of the above-referenced PPA/ephedrine-containing products, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®, and that she did not become aware of the causal link between the consumption of PPA/ephedrine-containing products and these health risks and injuries until recently.
12. As a direct and consequential result of the foregoing, Petitioner has sustained physical and mental pain and suffering, loss of income, loss of consortium, loss of enjoyment of life, and

other damages to be shown at trial. All of the foregoing damages are past, present and future

13 Petitioner, Jerome Donnelly, husband of Daphne Donnelly, has suffered, sustained, and incurred injuries as a result of his spouse's debilitating and impaired condition. Petitioner has suffered loss of consortium in the past and will sustain, in reasonable medical probability, a loss of consortium claim in the future.

14 The incident and any resultant damages occurred through no fault or negligence on the part of the Petitioner.

15 The incident and any and all resultant injuries and damages to Petitioner occurred through the fault of the pharmaceutical manufacturer defendants, as manufacturers of the product which contained PPA/ephedrine, in the following non-exclusive particulars:

1) Pharmaceutical manufacturer defendants are liable under the Louisiana Products Liability Act, Louisiana Revised Statutes Annotated 9:2800.51 *et seq*

a.) Pharmaceutical manufacturer defendants manufactured products which were unreasonably dangerous in design at the time the product left the manufacturers' control and such defects in design were the proximate cause of damages suffered by Petitioner. The products were ingested and taken as intended.

b.) Pharmaceutical manufacturer defendants failed to employ alternative designs which would have reduced, if not prevented Petitioner's damages, and their failure to employ alternative designs was a proximate cause of the damages suffered by Petitioner.

c.) Pharmaceutical manufacturer defendants failed to adopt alternative designs for their products and they knew of the likelihood that its products' design would cause Petitioner's injuries; and defendants knew the gravity of the potential injuries outweighed the utility of their products.

d.) Petitioner specifically alleges that an alternative design of pharmaceutical manufacturer defendants' products would have nullified, or substantially reduced the injuries Petitioner suffered.

e.) Pharmaceutical manufacturer defendants failed to post suitable and adequate warning(s) or instruction(s) concerning the risks of their products, including,

but not limited to, adequately warning potential users of the medication's known adverse side-effects, including heart problems and strokes, and any and all other side-effects suffered by Petitioner

- f) Pharmaceutical manufacturer defendants failed to alert users, potential users, and retail dealers who would be expected to sell and/or recommend its products, of the hazards associated with said products' usage, and further actively promoted and advertised their products in a manner that suggested the design of their products was safe

16. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability of pharmaceutical manufacturer defendants by their failure to exercise reasonable care in the manufacture of its products when they knew or should have known that Petitioner was a foreseeable and intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed to protect intended users of their products.

17. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault of defendants, as sellers and/or retailers of the product which contained PPA/ephedrine, rendering retailer/seller defendants liable for any and all damages suffered by Petitioner, including attorney fees, in the following non-exclusive particulars:

- 1.) Retailer/seller defendants are liable for breach of the warranty against redhibitory defects, or vices, in the subject over-the-counter medications, existing at the time of the sale to Petitioner, pursuant to La. Civ. Code Article 2520 *et seq.*
 - a.) Retailer/seller defendants failed to give Petitioner notice of the dangerous side-effects of the subject over-the-counter medications they sold to Petitioner which contained PPA/ephedrine; and retailer/seller defendants had actual knowledge of the existence of said redhibitory defects at the time of the sale
- 2.) Retailer/seller defendants are liable under La. Civ. Code Article 2524 for failure to sell a product fit for its ordinary usage
 - a.) Retailer/seller defendants knew Petitioner's intended usage of the subject over-the-counter medications and knew of Petitioner's reliance on the skill and

judgment of retailer/seller defendants in the sale of their over-the-counter medications. Retailer/seller defendants failed to exercise the appropriate skill of judgment in the sale of their products to Petitioner.

3.) Retailer/seller defendants are liable under La. Civ. Code Article 2529 for delivering products not of the kind or quality specified by the seller.

a.) Retailer/seller defendants sold over-the-counter medications to Petitioner which were misrepresented by retailer/seller defendants as being safe for human consumption. Retailer/seller defendant failed to adequately inform Petitioner of the dangers inherent in the over-the-counter medications they sold to Petitioner.

15. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability retailer/seller defendants by their failure to exercise reasonable care in the sale and/or retail of its products when it knew, or should have known, that Petitioner was a buyer and a foreseeable intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed by retailer/seller defendants to protect intended buyers and users of the subject products.

16. Pharmaceutical manufacturer defendants and retailer/seller defendants are liable *in solido* for intentional and willful conspiracy pursuant to La. Civ. Code Article 2324. Defendants, among themselves, conspired with one another to conceal material facts including the hazardous nature of the subject product they manufactured and sold to the public in general and Petitioner. Defendants knew that the injuries suffered by Petitioner were substantially certain to occur through the consumption and ingestion of the over-the-counter medication they manufactured and sold.

17. Venue for this action arises under Louisiana Code of Civ. Pro. Articles 42 *et seq.*, as the wrongful conduct of defendants complained of herein occurred in the Parish of St. Bernard. Petitioner purchased and suffered her injuries in St. Bernard Parish, State of Louisiana.

WHEREFORE, Petitioner prays that after due proceedings be had there be a judgment rendered herein in favor of Petitioner and against defendants jointly, severally, and *in solido*, for such damages as are reasonable in the premises, together with the maximum legal interest from the date of judicial demand, until paid, for all costs of these proceedings,

and for all other general and equitable relief to which Petitioner may be awarded. Petitioner respectfully requests a TRIAL BY JURY.

Respectfully submitted,



J. Chandler Loupe
CLAYTOR & LOUPR, LLC
STATE BAR NO. 19955
2223 Quail Run Drive, Ste. G
Baton Rouge, LA 70808
(225) 767-2222 (Telephone)
(225) 767-9003 (Facsimile)

KIRK LAW FIRM
Dana Kirk
MS STATE BAR NO. 100188
TX STATE BAR NO. 11057500
4265 San Felipe Street, Ste. 1400
Houston, TX 77027
(713) 651-0050

CLARK, DEPEW & TRACEY, LTD., L.L.P.
Clayton Clark
TX STATE BAR NO. 04275750
440 Louisiana Street, Ste. 1600
Houston, TX 77002
(713) 757-1400

J. ROBERT DAVIS LAW FIRM
J. Robert Davis
TX STATE BAR NO. 00788859
440 Louisiana Street, Ste. 1600
Houston, TX 77002
(713) 425-5255

PLEASE SERVE:

BAYER CORPORATION
By and Through its Registered Agent for Service of Process:
CT Corporation System
8550 United Plaza Blvd.
Baton Rouge, LA 70809

NOVARTIS PHARMACEUTICAL CORPORATION
By and Through its Registered Agent for Service of Process:
320 Somerulos Street
Baton Rouge, LA 70802

NOVARTIS CONSUMER HEALTH, INC.
By and Through its Registered Agent for Service of Process
Corporation Service Company
2711 Centerville Road, Ste. 400
Wilmington, DE 19808

A TRUE COPY

Lena R. Torres
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

By 
DEPUTY CLERK
/S/ SUSAN A. RANDAZZO

4LIFE RESEARCH, LC

By and Through its Registered Agent for Service of Process
David Lisonbee
9850 S 300 W.
Sandy, UT 840703262

SMOOTHIE KING CO , INC.

By and Through its Registered Agent for Service of Process
Stephen Kuhnau, Sr
2400 Veterans Blvd., Ste 110
Kenner, LA 70062

SMOOTHIE KING SYSTEMS, INC.

By and Through its Registered Agent for Service of Process.
Stephen Kuhnau, Sr.
2400 Veterans Blvd., Ste. 110
Kenner, LA 70062

WALGREEN LOUISIANA CO , INC

By and Through its Registered Agent for Service of Process:
The Prentice-Hall Corporation System, Inc.
701 South Peters Street, Second Floor
New Orleans, LA 70130

CLAITOR & LOUPE, L.L.C.

ATTORNEYS AND COUNSELORS AT LAW

2223 Quail Run Drive, Suite G, Baton Rouge, Louisiana 70808

Tel: (225) 767-2222 • Fax: (225) 767-9003

July 24, 2002

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

NO.: 7002 0460 0001 9147 0243

Novartis Consumer Health, Inc.

By and Through its Registered Agent for Service of Process:

Corporation Service Company

2711 Centerville Road, Suite 400

Wilmington, DE 19808

RE: *Daphine B. Donnelly, and Jerome Donnelly, Husband vs. Bayer Corporation, et al*
34th JDC, St. Bernard Parish, Docket No.96,487, Division "C"

Sir/Madam.

We represent Daphine B. Donnelly, and Jerome Donnelly, husband, in claims arising out of incidents, wherein our clients ingested a product containing PPA.

We have filed the above numbered and captioned suit on behalf of Daphine B. Donnelly, and Jerome Donnelly, husband, for damages resulting from this incident. Since you are a non-resident of Louisiana, we are obtaining service of process on you pursuant to LSA R.S. 13:3201 et seq. In order to comply with the requirements of law, we give you herewith notice of such service, together with a certified copy of the Petition and Citation which is being sent by the plaintiffs, via certified mail

Please forward this matter to your attorney for immediate handling.

Sincerely,

CLAITOR, LOUPE & BATEMAN, L.L.C.


J. Chandler Loupe

JCL:seb

Attachments

THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

CITATION

NO. 96-487

DAPHINE B. DONNELLY, AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, L.C, SUCCESSOR BY MERGER TO SHAPERITE,
SMOOTHIE KING CO.; SMOOTHIE KING SYSTEMS, INC.;
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

TO NOVARTIS CONSUMER HEALTH, INC.
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
CORPORATION SERVICE COMPANY
2711 CENTERVILLE ROAD, SUITE 400
WILMINGTON, DE 19808

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for Damages. The Petition tells you what you are being sued for.

You must either DO WHAT THE PETITION ASKS, OR WITHIN THIRTY (30) DAYS after you have received these documents, you must file an answer or other legal pleadings in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W. St. Bernard Hwy, Chalmette, LA 70043

If you do not do what the Petition asks, or if you do not file an answer or legal pleading within THIRTY (30) DAYS, a judgment may be entered against you without further notice.

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the 2nd day of July, 2002.

bar P1

LENA R. TORRES
CLERK OF COURT

BY Susan A. Randazzo
Deputy Clerk/S/ SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ this Parish in the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with this service I learned by interrogating the same _____ the said _____ being absent from _____ domicile at the time of said service.

Returned Parish of St. Bernard _____, 2002

Sheriff

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ on _____ at _____ this Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to in _____ Returned Parish of St. Bernard _____, 2002

Sheriff

JUL-23-2002 13:44

NOVARTIS LEGAL

P.02/10

THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

ENTERED

CITATION

NO 96-487

DAPHNE B. DONNELLY, AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION, NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.,
LIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE,
SMOOTHIE KING CO.; SMOOTHIE KING SYSTEMS, INC.;
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

TO NOVARTIS PHARMACEUTICAL CORPORATION
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
320 SOMERULOS STREET
BATON ROUGE, LOUISIANA

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for
Damages. The Petition tells you what you are being sued for.

You must either DO WHAT THE PETITION ASKS, OR WITHIN FIFTEEN (15)
DAYS after you have received these documents, you must file an answer or other legal pleadings
in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W. St. Bernard
Hwy, Chalmette, LA 70043.

If you do not do what the Petition asks, or if you do not file an answer or legal pleading
within FIFTEEN (15) DAYS, a judgment may be entered against you without further notice.

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the
2nd day of July, 2002.

saz PI

LENA R. TORRES
CLERK OF COURT

BY *Susan A. Randazzo*
Deputy Clerk/ST. SUEAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of
_____, 2002, I served a copy of the within _____ by leaving
the same at _____ domicile _____ this Parish in the hands of
_____ a person apparently over the age of 14 years living and residing in said domicile,
whose name and other facts, connected with this service, I stated by interrogating the same
_____ the nature of the within _____
at the time of said service.

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002, I served a copy of the within _____ on _____ this
Parish her usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to a
Resident Parish of St. Bernard _____, 2002

Sherril

AFFIDAVIT OF STEVE KUHNAU

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state set forth above, personally came and appeared

STEVE KUHNAU

who, after being duly sworn, deposed and stated the following:

1.

I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, could and would competently testify to the following

2.

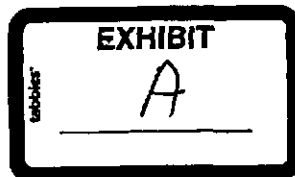
The Smoothie King store located at 3366 Paris Road, Chalmette, Louisiana is the only store operated in Chalmette, Louisiana and there has been no other store operating in that geographic location in the history of the Smoothie King franchising business.

3.

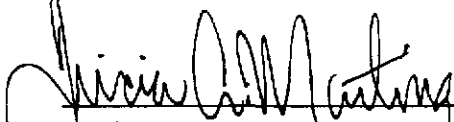
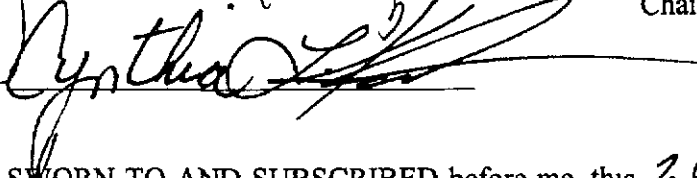
The Franchise Agreement #20 which authorizes this Chalmette, Louisiana location was executed by franchisees on October 9, 1991

4

This Smoothie King store opened on February 17, 1992 at the location of 3366 Paris Road, Chalmette, Louisiana



WITNESSES.


STEVE KUHAU
Chairman, Board of Directors

SWORN TO AND SUBSCRIBED before me, this 26 day of July, 2002, in New Orleans,
Louisiana


Notary Public



9850 South 300 West • Sandy, UT 84070 • (801) 562-3600 • (801) 562-3611 Fax

July 31, 2002

VIA FACSIMILE ONLY
(504) 585-7075

Charles Blanchard
CHAFFE, MCCALL, PHILLIPS, TOLER & SARPY
2300 Energy Centre, 1100 Poydras St
New Orleans, LA 70163

Re Donnelly, et al v Bayer Corporation, et al
34th JDC, St Bernard Parish
Docket No 96,487, Division "C"
Consent to Notice of Removal

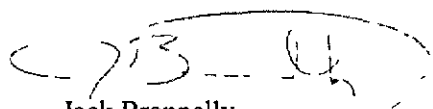
Dear Charles

I am corporate counsel for 4Life Research, LC, one of the named defendants in the above action. I am responsible for managing all litigation for 4Life worldwide.

4Life is incorporated in Utah, and has its principal place of business in Sandy, Utah.

You have indicated that Bayer and other defendants plan to file a Notice of Removal in the U S District Court for the Eastern District of Louisiana, and that all defendants who have been properly served in the action must agree to such removal. 4Life was served with the complaint in the above action on **July 29, 2002**, and hereby consents to the notice of removal, but reserves all defenses, objections and claims.

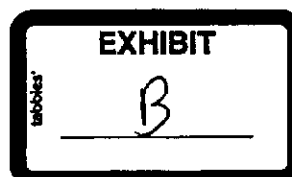
Very truly yours,


Jack Brannelly
Vice President of Legal Affairs
4Life Research, LC

JJB/

cc Steve Tew, CFO, COO
File

4Life Research, LC



FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 JAN 29 PM 2 55

LOREITH G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LAWRENCE MOSLEY ET AL.

CIVIL ACTION

VERSUS

NO. 01-3479

BAYER CORPORATION, ET AL.

SECTION "B"(4)

ORDER AND REASONS

Below is Plaintiffs' Motion to Remand (Rec Doc No 8), and motions brought by various Defendants to dismiss, for more definitive statement and for temporary stay (Rec Doc Nos 5, 11, & 16)

In February of 1995, Lawrence Mosley purchased over Alka-Seltzer Plus and Dimetapp, both the counter medications, at a Rite Aide, then K&B, store in New Orleans, Louisiana. Mosley alleged that after taking the medication, he suffered a stroke, which caused severe, permanent, and disabling injuries. Mosley and his wife filed suit in Civil District Court for the Parish of Orleans in 2001. Named as Defendants were Bayer Corporation, the

DATE OF ENTRY
JAN 8 9 2002

1



manufacturer, marketer and distributor of Alka-Seltzer Plus, Miles Inc., the distributor of Alka-Seltzer Plus, American Home Products Corporation and Whitehall-Robbins Health Care, manufacturers and distributors of Dimetapp, and K&B Louisiana Corporation ("K&B/Rite-Aid"), seller of both Alka-Seltzer Plus and Dimetapp. Plaintiffs alleged Defendants knew or should have known that both Alka-Seltzer Plus and Dimetapp contained Phenylpropanolamine ("PPA"), which substantially increases the risk of stroke in users. Plaintiffs alleged that Defendants failed to warn Mosley of the harmful effects of PPA, which, according to Plaintiffs, caused Mosley's stroke.

Defendants removed this matter to federal court on November 19, 2001 arguing that Defendant K&B/Rite Aid was fraudulently joined. Plaintiffs timely filed a motion to remand. Defendants then filed motions to dismiss for failure to state a claim, for more definite statement, and to stay the proceedings pending a final ruling of the Judicial Panel on Multidistrict Litigation.

MOTION TO STAY

Defendants urged this Court to stay all proceedings, including Plaintiffs' Motion to Remand, in order to promote judicial efficiency, consistency, and for the convenience of the parties and witness. Defendants maintained that Plaintiffs' pending Motion to

Remand involves jurisdictional objections common to numerous other PPA cases, and that there was a risk of inconsistent pretrial rulings. The benefits of a temporary stay, contended Defendants, minimizes and outweighs any potential prejudice to Plaintiffs. Moreover, a temporary stay will prevent Defendants from incurring the unnecessary expense of engaging in duplicative pretrial proceedings. Relying on *Rivers v. Walt Disney*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997), Defendants maintained that judicial efficiency dictates that this Court exercise its authority and stay the action pending the Panel's decision on transfer. However, Defendants ignore Rule 15 of the Rules for Multidistrict Litigation.

Rule 15 expressly provides that

the pendency of a conditional transfer order does not in any way i) suspend orders and pretrial proceedings in the district court in which the action that is the subject of the conditional transfer order is pending, or ii) limit the pretrial jurisdiction of that court, and . . . those courts wishing to address such motions have adequate time in which to do so

In re Asbestos Products Liability Litigation v. International Paper Co., 170 F. Supp. 2d 1348, 1349 (J.P.M.L. 2001). Thus, this Court retains jurisdiction to conduct all pretrial proceedings despite Defendants's pending motion to transfer. *McGrew v. Schering-Plough*

Corp., No 01-2311, 2001 U S Dist. LEXIS 12205 at *7 (D. Kan Aug 6, 2001) Moreover, for purposes of judicial economy, the jurisdictional issue should be resolved immediately for if federal jurisdiction does not exist, the case can be remanded before federal resources are further expended. *Id* Judicial economy, in this case, dictates a present ruling on the remand issue and motions to dismiss *Id*.

MOTION TO REMAND

The "party invoking the removal jurisdiction of the federal court bears a heavy burden " *Sid Richardson Co. v. Interenergy Resources, LTD.*, 99 F 3d 746, 751 (5th Cir 1996) To prevail on the argument that "non-diverse defendants were fraudulently joined in order to defeat diversity, the removing party must demonstrate 'that there was absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court '" *Id*.

When "reviewing a claim of fraudulent joinder, the district court must evaluate all factual allegations and ambiguities in the controlling state law in favor of the plaintiff If there is any possibility that the plaintiff has stated a cause of action against any non-diverse defendant, the federal court must conclude that joinder is proper, thereby defeating complete diversity, and the case must be remanded

Id. (citing *Burden v. General Dynamics Corp.*, 60 F 3d 213, 216 (5th Cir 1995) Moreover, in evaluating fraudulent joinder, the court does not "determine whether the plaintiff will actually or even probably prevail on the merits of the claim, but look[s] only for a possibility that the plaintiff might do so." *Id.* (citing *Burden*, 60 F 3d at 216)

Defendants argued that there was no reasonable basis under Louisiana law that Plaintiffs can recover against K&B/Rite Aid because Plaintiffs' redhibitory defect claims have prescribed. See *Sid Richardson Co.*, 99 F 3d at 753 (allowing the consideration of affirmative defenses when determining fraudulent joinder). If

[D]efendants prevail on any [affirmative] defenses, it necessarily follows that joinder was fraudulent, and the district court properly exercised its removal jurisdiction. On the other hand, if there is any possibility that [Plaintiff] might survive the affirmative defenses, we must vacate for remand to state court.

Id.

Article 2534 of the Louisiana Civil Code provides that

The action for redhibition against a seller who did not know of the existence of a defect in the thing sold prescribes in four years from the day delivery of such thing was made to the buyer or one year from the day the defect was discovered by the buyer, whichever occurs first. The action for

redhibition against a seller who knew, or is presumed to have known, of the existence of a defect in the thing sold prescribes in one year from the day the defect was discovered by the buyer.

LA. CIV CODE art 2534 (West 1996 & Supp 2001) According to Plaintiffs' petition for damages, the allegedly defective products were sold in 1995. Moreover, Plaintiffs alleged that Defendants knew or should have known of the harmful affects of PPA. Therefore, according to Plaintiffs, Defendants are bad faith sellers.¹ As a result, Plaintiffs redhibitory claims prescribed within one year of Plaintiffs' discovery of the defect. Plaintiffs' Petition for Damages failed to indicate when Plaintiff discovered the alleged redhibitory defect. This could have occurred within one year of the filing of this claim. Thus, there is a possibility that Plaintiffs could recover against Defendant K&B/Rite Aid and removal was improper. In so ruling, this Court is without jurisdiction to reach a determination on Defendants' other motions. Accordingly,

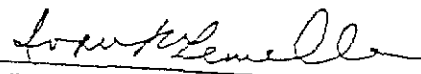
¹If Defendants were good faith sellers, then Plaintiffs claims have prescribed. The year 1999 marked four years since the product was purchased by Mosley. If this event occurred before Plaintiffs discovered the defect then 1999 would be the year Plaintiffs claims prescribed and thus the subsequent 2001 filing was untimely. If Plaintiffs discovered the defect before 1999, then Plaintiffs 2001 filing was again untimely.

IT IS ORDERED Defendants' Motion to Stay (Rec Doc. No 15) is
DENIED

IT IS FURTHER ORDERED that Plaintiffs' Motion to Remand (Rec
Doc. No 18) is GRANTED and this case is remanded to the Civil
District Court for the Parish of Orleans, Section "N", Number 2001-
17315

IT IS FURTHER ORDERED that Defendants' motions to dismiss and
for more definite statement are DISMISSED due to lack of
jurisdiction to hear said motions.

New Orleans, Louisiana, this 18th day of January, 2002



IVAN L R LEMELLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
OFFICE OF THE CLERK

LORETTA G. WHYTE
CLERK

500 CAMP ST., ROOM C-151
NEW ORLEANS, LA 70130

January 29, 2002

Clerk
Civil District Court
Parish of Orleans
421 Loyola Avenue
New Orleans, LA 70112

RE. Mosley
v
Bayer Corporation

Civil Action No. 2 01-cv-03479
Section B (4)
Your No. 2001-17315-N

Dear Sir

I am enclosing herewith a certified copy of an order entered by
this court on January 29, 2002 remanding the above-entitled case to
your court

Very truly yours,

LORETTA G. WHYTE, CLERK

By.

Peggy Koste
Deputy Clerk

Enclosure

me

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
2002 MAR -5 1 A 8 43
J. J. AG WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MODESTA ST AMANT, *ET AL*

CIVIL ACTION

VERSUS

NO 01-3421

BAYER CORPORATION, *ET AL*

SECTION "S" (5)

ORDER AND REASONS

Before the court are plaintiffs Modesta and Geraldine St Amants' motion to remand (Document 9), defendant Bayer Corporation's motion for temporary stay (Document 12), Bayer's motion for reconsideration of the order staying transfer of the case (Document 14), and Bayer's motion to dismiss (Document 4). IT IS HEREBY ORDERED that plaintiffs' motion to remand is GRANTED.

A Factual background

The St Amants filed suit in the Civil District Court for the Parish of Orleans on October 22, 2001. They alleged that Modesta St Amant had sustained personal injuries as a result of his use of the over-the-counter medication Alka Seltzer Plus, which contained the ingredient Phenylpropazolumine (PPA). The St Amants named as defendants Bayer and Miles, Inc., who allegedly designed, manufactured, marketed, and distributed Alka Seltzer Plus. They also named

DATE OF ENTRY
MAR 05 2002

EXHIBIT
D

Walgreen Louisiana Co , Inc , alleging that it "is engaged in the business of distributing over-the-counter medications known as Alka Seltzer Plus products used for cold symptoms " See plaintiffs' Petition for Damages at ¶ 8

The St Amants' Petition alleges that defendants are liable to them under the Louisiana Products Liability Act (LPLA), in negligence, and as a result of their fraud and misrepresentation. They contend that defendants "knew or should have known" that PPA "could cause severe and life-threatening complications and side effects including but not limited to stroke, atrial arrhythmia, vasospasms, and severe elevation of blood pressure " *Id* at ¶ 14. The St Amants further contend that defendants "failed to warn" them of the hazards of PPA, or "concealed [their] knowledge of these hazards" from them. *Id* at ¶ 15. The St Amants specifically alleged a cause of action in redhibition against defendants under La. Civ. Code art. 2520 *et seq* , claiming that defendants were liable for selling a product warranted as safe and effective when it was not reasonably fit for its intended use. *Id* at ¶ 32. The St Amants prayed for punitive damages, compensatory damages, attorney's fees, and "such other relief as provided for in Louisiana civil code Article 2545 " *Id* at prayer, ¶ C.

Defendants removed the suit, basing federal jurisdiction on diversity under 28 U.S.C. § 1332. Defendants averred that each of them with the exception of Walgreen is completely diverse in citizenship from the plaintiffs, and that Walgreen was fraudulently joined. Although a conditional transfer order has been issued by the Judicial Panel on Multidistrict Litigation (CTO - 6), plaintiffs have opposed the transfer. On December 12, 2001, the court granted plaintiffs' motion to stay transfer of this case pending a hearing on their motion to remand, which was held on January 16, 2002. Additionally, defendants have moved to stay any ruling on plaintiffs' remand

motion pending the decision by the Panel on whether this matter should be transferred

B. Analysis.

1. Defendants' motion to stay

Defendants argue that the court should decline to rule on plaintiffs' remand motion until the Judicial Panel on Multidistrict Litigation renders a decision on whether this case should be transferred to the multidistrict litigation pending in the United States District Court for the Western District of Washington. The court finds that judicial economy is best served in this case by resolving the jurisdictional issue immediately. If federal jurisdiction does not exist, this case should be remanded without the need for further federal proceedings. Consequently, the court denies defendants' motion to stay.

2. Plaintiffs' motion to remand

The general removal statute provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" may be removed. 28 U.S.C. § 1441(a). Defendants contend that this action falls within the scope of the diversity statute, which requires complete diversity of citizenship between the parties and an amount in controversy in excess of \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). The parties do not dispute that the amount in controversy exceeds the jurisdictional minimum.¹

Plaintiffs' remand motion argues only that complete diversity does not exist because they named Walgreen as a defendant. Like plaintiffs, Walgreen is a citizen of Louisiana. Defendants argue that Walgreen has been fraudulently joined, and that its presence as a nominal defendant should

¹ Plaintiffs' Petition alleges that Modesta St. Amant sustained "severe, permanent, and disabling injuries to mind and body," including a hemorrhagic stroke and paralysis. See Petition at ¶¶ 5 and 36. Plaintiffs have also requested punitive damages.

not destroy diversity

The test for fraudulent joinder is well established. The "burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one." *Hart v. Bayer Corp.*, 199 F.3d 239, 246 (5th Cir. 2000) (quoting *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)). "To establish fraudulent joinder, the party crying foul must show there is no reasonable probability of recovery against the joined party or that there has been outright fraud in the pleadings of jurisdictional facts." *Delgado v. Shell Oil Co.*, 231 F.3d 165, 179 (5th Cir. 2000), cert. denied, 532 U.S. 972, 121 S. Ct. 1603, 149 L.Ed.2d 470 (2001).

The St. Amants argue that they have a valid redhibition claim against Walgreen. Chapter III, Title 9 of the Louisiana Civil Code provides the purchaser of a product with a cause of action in redhibition. Article 2520 provides generally that "A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale." The Civil Code provides different remedies depending on whether the seller knows of the defect. If the seller "knew not of the defect," he "is only bound to repair, remedy, or correct the defect," and if he cannot do so, he must "return the price to the buyer with interest from the time it was paid," and "reimburse him for the reasonable expenses occasioned by the sale." La. Civ. Code art. 2531. If the seller "knows that the thing he sells has a defect but omits to declare it," the seller "is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees." *Id.* at art. 2545.

In this case, plaintiffs invoked La. Civ. Code art. 2545 in their Petition, and alleged that all defendants "knew or should have known" of the hazards of PPA yet did not disclose them. Plaintiffs' Petition does not present any specific facts demonstrating that Walgreen knew of the dangers of PPA. In *Strickland v. Brown Morris Pharmacy*, No. 96-815, 1996 WL 537736 (E.D. La. Sept. 20, 1996), the court found that similar conclusory allegations about a defendant pharmacy's knowledge of the dangers of Primatine Mist could not support a bad-faith redhibition claim against the pharmacy under La. Civ. Code art. 2545.

There are no facts asserted which would support a finding that Brown Morris [Pharmacy] either manufactured the product in question or knew or should have known that use of Primatine Mist by Mr. Strickland would cause the harm which occurred. Moreover, no facts have been avowed which would go to show that Brown Morris knew or should have known that Primatine Mist was an unsafe product in its normal and intended use. All the plaintiff has done in her petition is make conclusory allegations or legal conclusions put forward as factual findings which do not go toward establishing a cause of action.

Id. at *2

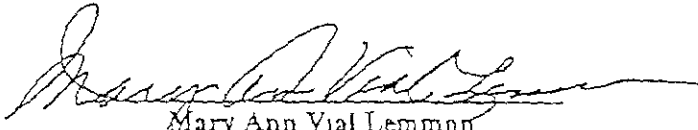
Plaintiffs have not adequately pleaded facts giving rise to a bad faith cause of action in redhibition under La. Civ. Code art. 2545. The issue before the court, then, is whether plaintiffs state a claim in redhibition against Walgreen as a good-faith seller. Under the clear terms of La. Civ. Code art. 2531, relief against a good-faith seller includes recovery of the price plaintiffs paid for Alka-Seltzer Plus with interest, plus any reasonable expenses occasioned by the sale. Thus, there is a reasonable possibility that plaintiffs may successfully prosecute a cause of action against Walgreen under state law, and Walgreen was not fraudulently joined. See *Kientz v. Bohn Brothers Toyota*, No. 00-3101, 2000 WL 1808496, at *2 (E.D. La. Dec. 8, 2000) (denying remand because plaintiffs asserted a viable claim under La. Civ. Code art. 2531 against nondiverse automobile seller), *Scott v. American Tobacco Co.*, 959 F. Supp. 340, 343-44 (E.D. La. 1996).

(denying remand because plaintiffs asserted a viable claim under La. Civ. Code Art. 2531 against nondiverse distributors of cigarettes, who were not therefore fraudulently joined)

C Conclusions

Judicial economy is best served in this case by resolving the jurisdictional issue immediately. Walgreen was fraudulently joined only if defendants demonstrate that plaintiffs have no reasonable possibility of recovering against it. The court finds that there is a reasonable possibility that plaintiffs can recover under La. Civ. Code art. 2531 against Walgreen as a good faith seller. Because Walgreen was not fraudulently joined, diversity jurisdiction is not present in this case.

New Orleans, Louisiana, this 4 day of March, 2002


Mary Ann Vial Lemmon
United States District Judge

MINUTE ENTRY
BARBER, J
APRIL 2, 2002

FILED
U.S. DISTRICT COURT
DISTRICT OF LA.

2002 APR -3 P 3 20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA LORETTA B. WHYTE
CLERK

JACQUELINE COLEMAN

CIVIL ACTION

VERSUS

NO 02-333

BAIER CORP , ET AL

SECTION "J" (3)

Before the Court is a Motion to Remand and Request for Costs and Expenses Pursuant to 28 U.S.C. § 1447 (Rec Doc 16) filed by plaintiff Jacqueline Coleman. The Court granted Plaintiff's request to hear the motion on an expedited basis. The motion is before the Court on briefs without oral argument and is opposed by Bayer Corporation ("Bayer") and American Home Products Corporation, or behalf of itself and its unincorporated division, Wyeth Consumer Healthcare, f/k/a Whitehall-Robins Healthcare (collectively "Wyeth"). Having considered the various memoranda filed by both sides and the applicable law, the Court concludes, for the reasons that follow, that Plaintiff's motion should be GRANTED.

BACKGROUND

On November 8, 2001, Jacqueline Coleman, a Louisiana citizen,

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EXHIBIT

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filed suit in the 24th Judicial District for the Parish of Jefferson, Louisiana seeking damages for heart failure she alleges resulted from her taking over-the-counter medications containing phenylpropanolamine ("PPA"). She brought suit against seven drug manufacturers and distributors whose products contained PPA and two businesses from which she purchased the medication, including Walgreen Louisiana Co., Inc. (d/b/a "Walgreens"). Plaintiff sued Walgreens, a Louisiana citizen, in its capacity as a retailer.

Defendants Bayer, Novartis Pharmaceuticals, and Wyeth removed Coleman's action to this Court pursuant to 28 U.S.C. § 1441, claiming that Plaintiff fraudulently joined Walgreens as a defendant in this action for the sole purpose of preventing removal based on diversity of citizenship. Defendants argue that Plaintiff fails to state a cause of action against Walgreens because no duty exists under Louisiana law that requires a pharmacy to advise or warn consumers of the adverse effects of a particular drug. Defendants further assert that Plaintiff does not have a reasonable basis to state a claim against Walgreens for a breach of warranty against redhibitory defects, because she cannot establish that Walgreens had knowledge of the alleged dangers of PPA.

Plaintiff asserts that she has stated several viable claims under Louisiana law against Walgreens, not as a pharmacy but as a

seller/retailer, and moves the Court to remand the action to the 24th Judicial District for the Parish of Jefferson, Louisiana

DISCUSSION

To prove fraudulent joinder, the removing party has the substantial burden of proving "that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." Cavallini v. State Farm Mut. Auto. Ins. Co., 44 F.3d 256, 259 (5th Cir. 1995) (quoting Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983)). The Fifth Circuit has further held that

if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendant(s) have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts.

B... Inc. v. Miller Brewing Co., 663 F.2d 545, 550 (5th Cir. 1981)

Accordingly, the Fifth Circuit requires that a district court confronted with a claim of fraudulent joinder must "evaluate all of the factual allegations in the plaintiff's state court pleading in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff" and

'then examine relevant state law and resolve all uncertainties in favor of the nonremoving party.' " Cavallini, 44 F.3d at 259

Plaintiff asserts that she has stated valid claims against Walgreens for (1) breach of the warranty against redhibitory defects, (2) failure to deliver a product of the kind specified by the seller, (3) failure to sell a product fit for its ordinary usage, (4) negligence, (5) intentional and willful conspiracy, (6) fraud and misrepresentation, and (7) negligent and reckless misrepresentation. In support of her claims, Plaintiff alleges that all of the defendants, including Walgreens, knew or should have known of the unreasonable dangerous side-effects of consuming products with PPA, prior to the Yale study being released and the FDA order to discontinue the manufacture of products containing PPA. Plaintiff argues that all the defendants knew or should have known of other studies, regulatory actions, incidences of injury and/or death, concerns about safety among scientists and other professionals, meetings among pharmaceutical industry officers and employees, the desire of certain defendants to stop or delay regulatory action, and the contents of many of the defendants' own files, plans, and reports regarding the adverse health risks of PPA.

In order to remand this matter, the Court need only find that

there is a possibility of recovery under one of the stated causes of action, not that Plaintiff may prevail against Walgreens on all of her claims. See B. Inc. v. Miller Brewing Co., 663 F.2d 545, 550 (5th Cir. 1981). The Court does not "decide whether the plaintiff will actually or even probably prevail on the merits, but look only for a possibility that [s]he may do so." Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 43 (5th Cir. 1992) (citing Green v. Merada Hess Corp., 707 F.2d 201 (5th Cir. 1983)).

Under Louisiana law, to determine whether a plaintiff has stated a cause of action, the Court asks "whether the law extends a remedy to anyone under the factual allegations of the petition." Louisiana Paddlewheels v. Louisiana Riverboat Gaming Comm'n., 94-2015, p. 4 (La. 11/30/94), 646 So.2d 885, 888, n. 3. Accordingly, the question to be answered is, whether in the light most favorable to plaintiff, the petition states any valid cause of action for relief. City of New Orleans v. Board of Commissioners of Orleans Levee District, 93-069 (La. 7/5/94), 640 So.2d 237, 253.

Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice. La. Civ. Code art. 2520. Redhibition claims are

classified as either "good faith" or "bad faith," depending on whether the seller knew of the defects in the product sold. A seller is in bad faith when he knew of the vice of the thing he sold but failed to declare it. See Associates Financial Services Co., Inc. v. Ryan, 382 So.2d 215, 220 (La App. 3d Cir. 1980).

In the instant action, Plaintiff alleges that Walgreens was such a bad faith seller. Plaintiff asserts that Walgreens not only was aware of the adverse health risks posed by PPA-containing products prior to the Yale study that was released in 2000, but also conspired with the other defendants to conceal that such products were unsafe for human consumption. Furthermore, Plaintiff specifically alleges that all of the defendants, Walgreens included, were aware, or should have been aware, that PPA was unsafe, through studies performed prior to the Yale study, concerns among the industry of the dangerous side effects of PPA, and case reports involving PPA.

Plaintiff in the instant case has specifically alleged that Walgreens had knowledge of the dangerous side effects of PPA and has stated facts, which if accepted as true for the purposes of this motion, give rise to a viable cause of action in redhibition.¹

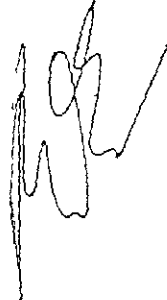
¹ This does not mean that the Court concludes that Plaintiff has not also stated other causes of action under Louisiana law.

Accordingly,

IT IS ORDERED that Plaintiff Jacqueline Coleman's Motion to Remand (Pec Doc 16) should be and is hereby GRANTED and the action is hereby REMANDED to the 24th Judicial District for the Parish of Jefferson, Louisiana

IT IS FURTHER ORDERED that Plaintiff's request for costs and expenses is DENIED Each side is to bear its own costs related to this matter

* * * * *

A handwritten signature, likely of a judge or court official, written in dark ink. The signature is stylized and appears to be a first name followed by a last name, though the specific letters are difficult to decipher due to the cursive style.

Rather, as discussed above, for purposes of this remand, the Court need only find that Plaintiff could possibly recover on one cause of action



CASE. 2:02-cv-02436/P
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CLERK: tbl

*** There will be no noticing for this document.***

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EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
CLERK
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC ; and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
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* NO 02-CV-2436
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* JUDGE ENGELHARDT
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* MAGISTRATE JUDGE SHUSHAN
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CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF BILL VANDERHAAR

PLEASE TAKE NOTICE that Plaintiffs will take the deposition upon oral examination of Mr Bill VanderHaar, now or formerly an employee of Bayer Corporation, on October 14, 2002, at the law office of McElroy, Deutsch & Mulvaney, 1300 Mt Kemble Avenue, Morristown, NJ (973-993-8100, www.mdmlaw.com), beginning at 9 00 a m and continuing until completed

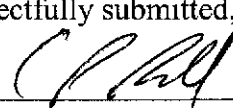
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The deposition will be conducted pursuant to the provisions of Case Management Order No 1,¹ will be stenographically recorded by the court reporting firm of Tate & Tate, 180 Tuckerton Road, Suite 5, Medford, NJ 08055 and will be videotaped by Lawyers' Video Service, Inc , 33 Rock Hill Road, Bala Cynwyd, PA 19004 The examination will also be videotaped by Veritext, 25B Vreeland Road, Florham Park, NJ 07932, which will have a video camera trained on the questioner during the examination Michelle Parfitt and/or Steven Rotman will represent plaintiffs

You are at liberty to appear and examine the witness

DATED this 4th day of September, 2002

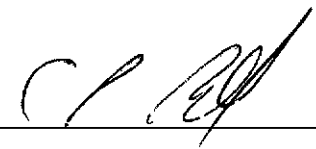
Respectfully submitted,



Mary L. Meyer, Esq (19966)
John F. Olinde (1515)
Charles P. Blanchard (18798)
**CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid



¹ A copy of the Case Management Order No 1 is attached to a prior Cross-Notice of Deposition filed in this case

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 SEP -5 PM 1:06
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* * * * *

* CIVIL ACTION
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* NO 02-CV-2436
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* JUDGE ENGELHARDT
*
* MAGISTRATE JUDGE SHUSHAN
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**CROSS-NOTICE OF
VIDEOTAPED DEPOSITION OF CRAIG HAMMES**

PLEASE TAKE NOTICE that Plaintiffs will take the deposition upon oral examination of Mr. Craig Hammes, now or formerly an employee of Bayer Corporation, on October 7, 2002, at the law office of Eckert, Seamans, Cherin & Mellott, 1515 Market Street, Philadelphia, PA (215-851-8400, [www escm com](http://www.escm.com)), beginning at 9 00 a m and continuing until completed

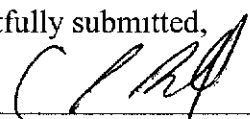
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You are at liberty to appear and examine the witness

DATED this 4th day of September, 2002

Respectfully submitted,



Mary L. Meyer, Esq (19966)
John F. Olinde (1515)
Charles P. Blanchard (18798)
**CHAFFE, MCCALL, PHILLIPS,
TOLER & SARP, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

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FILED
U.S. DISTRICT COURT
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CLERK
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
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merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-CV-2436
*
* JUDGE ENGELHARDT
*
* MAGISTRATE JUDGE SHUSHAN
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CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF TERRY GLASS

PLEASE TAKE NOTICE that Plaintiffs will take the deposition upon oral examination of Terry Glass, now or formerly an employee of Bayer Corporation, on September 23, 2002, at the law offices of McElroy, Deutsch & Mulvaney, 1300 Mt Kemble Avenue, Morristown, New Jersey, (973-993-8100, www.mdmlaw.com), beginning at 9 00 a m and continuing until completed

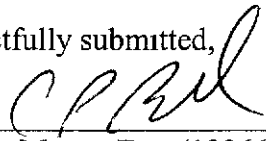
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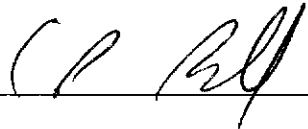
Respectfully submitted,



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Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid



¹ A copy of the Case Management Order No 1 is attached as Exhibit A

[WAWD Home](#) [Back to List](#) [MDL Home](#)

Western District of Washington U.S.D.C.

Case Management Orders



Subject:
Case Management Order No. 1

Date of Order:
01/29/2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY
LITIGATION This document relates to all actions MDL Docket
No. 1407 CASE MANAGEMENT ORDER NO. 1

I. INTRODUCTION

On November 16, 2001, an initial conference was held in order to address issues dealing with the structure and purposes of the leadership of plaintiffs and defendants in this multi-district litigation. During the course of that conference, various issues relating to discovery, experts, use of technology, class actions, and federal-state coordination were also discussed.

At the conclusion of the conference, the Court directed the parties to submit an agreed upon Case Management Order No. 1, to the extent possible, addressing a fact discovery schedule, deposition and document production procedures, expert disclosure and discovery, and any other matters felt necessary to promote the efficient and timely progress of this litigation.

By order dated November 21, 2001, this Court appointed Lead and Liaison Counsel for plaintiffs and defendants. The Court had previously indicated that Lead Counsel for each side, because of their knowledge of the skills, experience and compatibility of counsel involved in this litigation, should propose for Court approval the names of counsel to serve on various Committees. Those proposals have been made and the Court has acted thereon. The Court also requested the submission no later than December 14, 2001, of a Joint Proposed Case Management Order No. 1, to address the issues discussed during the initial conference, and any other topics.

The parties have now submitted a proposed Case Management Order No. 1, together with opposing submittals regarding various aspects of CMO No. 1 about which the parties disagree. After review and consideration of the parties' submissions, the Court hereby orders as follows:

II. STAY OF PROCEEDINGS IN CASES TRANSFERRED TO MDL 1407

All proceedings in any case transferred to MDL 1407, now or in the future, are stayed except as to the specific proceedings outlined in this Order, any pending motions to

remand presently before this Court, or in any subsequent order of the Court. All prior written discovery to which responses have not yet been served is deemed withdrawn. All dates on which responsive pleadings are due are hereby stayed until further notice, and all scheduling orders are hereby vacated. Nothing herein shall extend or modify the time permitted for removal of any case to federal court, nor shall any portion of this Order be deemed to apply to any case or matter now or hereafter pending in any state court unless that state court so orders.

III. STATUS CONFERENCES, MOTIONS, PLEADINGS AND SERVICE

A. Status Conferences. Status Conferences shall be regularly scheduled by the Court to permit substantial advance notice to all parties. Except as otherwise provided herein, and to accommodate the schedules of the Court and parties, oral argument or hearings on any motion will be scheduled to coincide with calendared Status Conferences. Counsel may attend and participate in Status Conferences, oral arguments and hearings by telephone at the Court's discretion by prior arrangement with the Court's chambers. Any hearing or oral argument deemed necessary by the Court on motions that require a ruling on an expedited basis will be scheduled to permit notice of at least two (2) business days. If circumstances warrant, the Court may shorten the notice period.

B. Motions. Motion practice shall be governed by applicable Federal and Local Rules except as otherwise provided herein or in any subsequent Case Management Order. Absent an Order of the Court, briefs in response to all motions shall be filed twenty-one (21) days after the date of service. Reply memoranda shall be filed within seven (7) days after service of the response. Oral argument or hearing on a motion will be scheduled to coincide with the first regularly scheduled Status Conference occurring after seven (7) days from the scheduled date, as extended by the Court, for the filing of Reply memoranda.

C. Notice to Parties by the Court. Notice by the Court to Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel of any matter, ruling, order, schedule or court hearing relating to all actions, shall be considered by the Court to be Notice to all parties in MDL 1407. Notice by the Court of any matter, ruling, order, schedule of court hearing relating only to individual actions shall be given to counsel of record for that action, Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel.

D. Service of Pleadings, Motions and Other Documents. Lead Counsel and any party filing with the Court a pleading, motion, or other document relating to all actions shall provide one (1) copy to Plaintiffs' Liaison Counsel, one (1) copy to Defendants' Liaison Counsel, and one (1) copy to opposing Lead Counsel by overnight mail or hand delivery. In addition, an electronic version of any document filed shall be provided at the time of service to the respective Liaison Counsel by electronic mail, on a floppy disk, or on CD-ROM in either WordPerfect or Microsoft Word format. If any document filed is comprised of or contains a paper copy of an electronic image of said document, the electronic image of said document(s) shall be similarly served. Service on

Plaintiffs' and Defendants' Liaison Counsel constitutes service on all plaintiffs' counsel and all defendants' counsel, respectively. Service and distribution by Liaison Counsel to other attorneys of record may be made via U.S. Mail and either e-mail, overnight courier service or facsimile transmission, reserving to any counsel of record the right to waive, in writing, all or any aspect of said service.

E. Communication with the Court. All communications with the Court should be through Lead or Liaison Counsel. Correspondence from individual plaintiff or defense counsel directly to the Court is strongly discouraged except when requested or the circumstances require direct contact. In any event, a copy of any such correspondence must be simultaneously served on Liaison Counsel.

IV. STATEMENT OF ISSUES

No later than 5 days prior to the next status conference, Lead Counsel for Plaintiffs and Defendants shall submit separate reports to the Court identifying and describing the legal and factual issues they believe will need to be addressed in these MDL proceedings. The reports by Lead Counsel shall not exceed 24 pages in length.

V. FACT DISCOVERY OF DEFENDANTS

Discovery as to defendants shall be governed by applicable Federal Rules of Civil Procedure and Local Rules except as otherwise provided herein or in any subsequent Case Management Order. Fact discovery has begun against certain, but not all defendants, in various state court proceedings. This Court has taken into consideration the present status and progress of discovery against various groups of defendants in fashioning a discovery schedule that will aid in fostering state and federal court coordination of PPA cases, and completing the tasks undertaken in this MDL 1407 with reasonable dispatch in keeping with the needs and expectations of litigants.

A. Completion of Fact Discovery. Fact discovery of all defendants, as divided into three distinct groups, shall be completed as follows:

(1) **Group I Defendants.** Group I Defendants are American Home Products Corporation, Novartis Consumer Health Inc., Bayer Corporation, SmithKline Beecham, Perrigo, and Chattem, and any related entities. Fact discovery as to Group I Defendants shall be completed on or before December 31, 2002.

(2) **Group II Defendants.** Group II Defendants are those defendants presently named in any case now docketed in this MDL 1407 not designated as Group I Defendants, such as Schering-Plough and Thompson/Delaco. Fact discovery as to Group II Defendants shall be completed on or before February 28, 2003.

(3) **Group III Defendants.** Group III Defendants are those defendants who are named in any action transferred to this MDL 1407 after the date of this Order. Fact discovery as to each such defendant shall be completed on or before 15 months following the first day of the month following the docketing of the first action naming said defendant in this MDL 1407.

B. Discovery Disputes. All disputes regarding the scope or conduct of fact discovery shall be resolved pursuant to the

standards and procedures set forth in the Federal Rules of Civil Procedure as augmented by the Local Rules of this District, except as otherwise provided herein.

C. Confidentiality of Produced Materials or Deposition Testimony. The Court has entered Case Management Order No. 2 (*Confidentiality of Material Produced and Testimony Relating Thereto*) pursuant to the joint submittal of same by the parties.

D. Preservation of Documents

The Court will enter Case Management Order No. 3 (*Preservation of Documents*) following the submittal of the positions of the parties regarding the content thereof.

E. Production of Documents

(1) **Master Request For Production of Documents.** Document production by most Group I Defendants is and has been ongoing in several state and federal court cases, all in response to virtually identical requests for production propounded by many of the plaintiffs' counsel named as members of the Plaintiffs' Steering Committee or Discovery Committee. Attached at Tab A is the *Master Requests For Production of Documents Addressed To All Defendants* ("Master Requests For Production") which incorporates the requests previously made and responded to by Group I Defendants and is hereby deemed served on all defendants named in any action transferred to this MDL 1407. In the absence of an agreement or further order of the Court, no further document requests may be propounded to the Defendants without leave of Court.

(2) **Prior Production and Responses to Requests to Produce.** To the extent that any Group I Defendant has produced documents in response to requests for production also contained in the Master Requests for Production, that production is hereby deemed to be production to the same requests contained in the Master Requests for Production. Similarly, to the extent that any Group I Defendant has responded to requests to produce also contained in the Master Requests for Production, those responses are hereby deemed to have been made to the same requests contained in the Master Requests for Production. All objections to production requests raised in a response made by any Group I Defendant are preserved to the extent existing as of the date hereof, and all rights held by plaintiff(s) to contest any objections made are similarly preserved and intact.

(3) Document Production Deadlines.

(a) **Group I Defendants.** Each Group I Defendant shall produce all documents maintained in hard copy responsive to the Master Requests for Production on or before February 28, 2002, except for those documents withheld pursuant to an assertion of privilege, work product or objection. Group I Defendants shall produce all documents maintained in electronic format responsive to the Master Requests for Production on or before March 30, 2002, except for those documents withheld pursuant to an assertion of privilege, work product or objection. The parties shall meet and confer as soon as practicable to resolve disputes concerning withheld documents. Motions to compel should only be filed on

those issues that cannot in good faith be resolved. The Court expects that document production will be completed by the deadlines above, and that no further extensions will be necessary.

(b) Group II Defendants. Each Group II Defendant shall respond to the Master Request for Documents no later than February 28, 2002 and produce all documents maintained in hard copy responsive to the Master Requests for Production no later than March 30, 2002, except for those documents withheld pursuant to an assertion of privilege, work product or objection. Group II Defendants shall produce all documents maintained in electronic format responsive to the Master Requests for Production on or before March 30, 2002, except for those documents withheld pursuant to an assertion of privilege, work product or objection. The parties shall meet and confer as soon as practicable to resolve disputes concerning withheld documents. Motions to compel should only be filed on those issues that cannot in good faith be resolved. The Court expects that document production will be completed by the deadlines above, and that no further extensions will be necessary.

(c) Group III Defendants. Each Group III Defendant shall respond to the Master Request for Documents within sixty (60) days of the transfer to this MDL 1407 of the first action in which it is named and produce all documents responsive to the Master Requests For Production on a rolling basis within one hundred twenty (120) days thereafter, except for those documents withheld under an assertion of privilege or protection, or where an objection has been asserted. The parties shall meet and confer as soon as practicable to resolve disputes concerning withheld documents. Motions to compel should only be filed on those issues that cannot in good faith be resolved.

(4) Manner of Production. With respect to all responsive documents or materials kept or maintained in either tangible form or in any electronic form, all defendants shall produce those documents or materials in "hard" copy, with appropriate identifying Bates numbering or labeling which shall include an alpha prefix identifying the defendant producing same. However, this provision shall not prohibit or otherwise impact any subsequent motion by plaintiffs to seek the production from any defendant of all responsive documents or materials kept or maintained in electronic form in the same format as they are kept or maintained. All defendants shall, to the extent reasonably possible, produce on a "rolling" basis, such that documents or materials should be made available for production and produced at regular intervals rather than accumulated with all other documents for production at the end of the document production period permitted herein. Each copy of a document shall convey the exact information and appearance of the original document unless redacted pursuant to a stated objection or privilege, in which event the fact that a redaction has been made shall be made apparent on the face of the document produced. If color is material to appreciating or comprehending the content of a document, parties shall honor reasonable requests for either the production of an original document for inspection and copying or production of a color image of

the document. Similarly, the parties shall comply with all reasonable requests for inspection and copying of an original document for all copies deemed unreadable or illegible, in whole or in part. The reasonable reproduction costs incurred by defendants of providing "hard" copies shall be borne by plaintiffs pursuant to applicable Federal and Local Rules.

(5) Document Images and Objective Databases. If a defendant chooses or has chosen to create electronic images of documents or materials produced in "hard" copy, duplicates of said images shall be produced to plaintiffs on CD-ROM disks on or before that defendant's document production deadline. The electronic images produced shall be in the same electronic format as utilized by defendant in creating and maintaining the electronic images. Provided, however, that should a defendant choose to create electronic images of only a select group of documents, such that the selection reflects the work product of its attorneys in conjunction with this litigation, then production shall not be required. The reasonable reproduction costs incurred by defendants of providing copies of CD-ROM disks containing images of documents produced shall be borne by plaintiffs pursuant to applicable Federal and Local Rules.

Any defendant that has created an objective database of documents produced in response to production requests of plaintiffs shall produce that database to plaintiffs. Provided, however, that should a defendant choose to create an objective database of only a select group of documents produced, such that the selection reflects the work product of its attorneys in conjunction with this litigation, then production of that database shall not be required. Defendants are permitted to redact database fields that contain subjective work product material. If a defendant seeks to withhold the database because it cannot redact the subjective materials, the defendant must first show good cause to the Court why it cannot segregate objective and subjective data. The same procedure will apply to plaintiffs' databases if sought by defendants during discovery. Plaintiffs will not be assessed costs for producing databases that defendants have prepared. However, if a defendant must incur additional costs to remove subjective material from the database, plaintiffs will bear the responsibility for those additional costs.

(6) Document Depositories. Lead Counsel for each side may establish a document depository for purposes it deems appropriate and necessary to accomplish their obligations to their respective constituencies in this MDL 1407. Each side shall administer and bear the costs of its own depository.

(7) Authentication of Documents. Pursuant to the stipulation of the parties, it is hereby ordered that the copies of all documents maintained in "hard" form produced by any defendant are deemed to be a true and accurate copy of documents in the possession and control of that defendant, except as otherwise indicated on the face of the copy produced. It is further ordered that the "hard" copies of all documents maintained in electronic form produced by any defendant are deemed to be a true and accurate representations of the data or other information maintained in electronic format by that defendant, except as otherwise indicated on the face of the "hard" copy produced.

(8) **Assertion of Privilege in Response to Production Requests.** Any party that withholds the production of requested documents or materials, regardless of the manner in which they are kept or maintained, on the ground of any privilege or application of the work-product doctrine must specify in writing, as to each document or thing not produced, the specific privilege(s) or doctrine(s) it is relying upon to withhold each document ("Privilege Log"). Each Privilege Log shall describe each document or thing to which a privilege or work product doctrine is asserted in sufficient detail to reasonably permit the party seeking discovery to assess whether or not to dispute any such assertion of privilege or application of the work product doctrine. Each party so withholding shall provide the Court and opposing Liaison Counsel a copy of the party's Privilege Log on or before thirty (30) days after the deadline for the production of "hard" copies of responsive documents or materials kept or maintained in tangible form and, with respect to responsive documents kept or maintained in electronic format, within thirty (30) days after the production deadline for "hard" copies of those documents or materials.

F. Interrogatories. A First Set of Interrogatories has been propounded to and answered by many Group I Defendants in several state and federal court cases. The interrogatories served have been virtually identical, and counsel serving same are included among the plaintiffs' counsel hereby named as members of the Plaintiffs' Steering Committee or Discovery Committee. Attached at Tab B is the *Master First Set of Interrogatories Addressed To All Defendants* ("Master First Set of Interrogatories") which incorporates the interrogatories previously propounded and answered by many Group I Defendants, and is hereby deemed served on all defendants named in any action transferred to this MDL 1407.

(1) **Prior Answers to Interrogatories.** To the extent that any Group I Defendant has answered interrogatories also contained in the Master First Set of Interrogatories, those answers are hereby deemed to be responses to the same interrogatories contained in the Master First Set of Interrogatories. All objections to such interrogatories raised in a response made by any Group I Defendant are preserved to the extent existing as of the date hereof, and all rights held by plaintiff(s) to contest any objections made are similarly preserved and intact.

(2) Interrogatory Answer Deadlines for Defendants.

(a) **Group I Defendants.** Each Group I Defendant shall respond to all interrogatories contained in the Master First Set of Interrogatories no later than January 15, 2002. The parties shall meet and confer as soon as practicable to resolve disputes concerning objections thereto. Motions to compel should only be filed on those issues that cannot in good faith be resolved.

(b) **Group II Defendants.** Each Group II Defendant shall respond to all interrogatories contained in the Master First Set of Interrogatories no later than February 28, 2002. The

parties shall meet and confer as soon as practicable to resolve disputes concerning objections thereto. Motions to compel should only be filed on those issues that cannot in good faith be resolved.

(c) Group III Defendants. Each Group III Defendant shall respond to all interrogatories contained in the Master First Set of Interrogatories within sixty (60) days of the transfer to this MDL 1407 of the first action in which it is named. The parties shall meet and confer as soon as practicable to resolve disputes concerning withheld documents. Motions to compel should only be filed on those issues that cannot in good faith be resolved.

G. Fact Depositions. All fact depositions shall be conducted pursuant to applicable Federal Rules of Civil Procedure and Local Rules, and as further specified below.

(1) **Deposition Notices.** In addition to the information required by applicable Rule, each deposition notice shall include the name, if known, of the primary examiner(s) designated by the party noticing the deposition, and the date, time and place of the deposition. In order for counsel to make arrangements for adequate deposition space, whenever feasible, counsel who intend to attend a deposition noticed in MDL 1407 should provide notice to the individual counsel signing the Notice of Deposition. Deposition notices shall state whether the deposition is to be videotaped and, if so, the name, firm and address of the videotape recorders.

(2) **Cross-Notices Between State Court Cases and These Proceedings.** In order to avoid duplicative discovery and to prevent the unnecessary expenditure of judicial resources and the resources of the parties, steps should be taken to encourage counsel in related state court proceedings to coordinate their depositions with MDL 1407 depositions. Plaintiffs' Liaison Counsel shall copy all known plaintiffs' state liaison counsel (by mail, courier, facsimile or electronic mail) on all deposition notices filed by plaintiffs in MDL 1407 and invite state court counsel to cross-notice the deposition. Defendants' Liaison Counsel shall provide Plaintiffs' Liaison Counsel and plaintiffs' known state liaison counsel with at least thirty (30) days notice of any cross-notice in these proceedings by defendants of a deposition originally noticed in a state court. Any motion to quash or stay any such cross-notice must be filed more than ten (10) days prior to the scheduled date of the cross-noticed deposition. The filing of any such motion will not delay the cross-noticed deposition, unless otherwise ordered by the Court. Absent grant of any such motion to quash or stay, no party shall re-notice the deposition of any witness already deposed under the terms of this Order unless permitted by the Court for good cause shown. If a deposition was originally noticed in this proceeding, whether or not later cross-noticed in state court proceedings, MDL counsel shall conduct the initial phase of the deposition. If a deposition was originally noticed in a state court proceeding and is later cross-noticed in this MDL proceedings, the state court counsel shall conduct the initial phase of the deposition. In either instance, questioning by state court counsel will not be counted against the time permitted for questioning pursuant to this MDL proceeding as described

below. Regardless of which counsel conducts the initial examination of the deponent, subsequent questioning shall not be redundant or repetitive, although clarification of prior testimony may be sought if reasonably calculated to elicit testimony that adds to the substance of prior testimony. Nothing in this provision shall be construed as an injunctive or equitable order affecting state court proceedings. Rather, this provision is intended to reflect this Court's desire for voluntary state-federal coordination.

(3) **Number of Depositions, Former Employees.** The defendants shall make available all present employees requested by plaintiffs for deposition, subject to the defendants' right to object to the taking of any particular employee's deposition for good cause shown. Plaintiffs shall in good faith take only those depositions deemed reasonably necessary under the circumstances of this case. Each defendant shall take reasonable steps to make available requested former employees, to the extent possible. If a defendant is unable, despite its best good faith efforts, to produce former employees, then the defendant shall provide upon request the former employee's last known address and shall cooperate in any effort to obtain this Court's, or another court's assistance to compel the former employee's attendance at the deposition. Plaintiffs shall not contact former employees without permission of the former employer defendant. As to each named defendant, plaintiffs shall be limited to a total of twenty (20) depositions of identified individuals, including former employees. In addition, plaintiffs may notice up to five (5) depositions pursuant to Fed. R. Civ. P. 30(b)(6) as to each defendant regardless of the number of deponents produced by said defendant in response to each such deposition noticed, provided that the particular matters identified in a notice on which examination is requested do not duplicate any matters identified in connection with a prior Rule 30(b)(6) deposition of that defendant, notice of which was properly served on plaintiffs pursuant to the terms of this Order. Absent agreement by the defendant, plaintiffs may apply to the Court to conduct further depositions only upon a showing of good cause and the specific identification of the individual(s) sought to be deposed.

(4) **Scheduling.** Plaintiffs may begin depositions of fact witnesses on January 20, 2002. If a deposition occurs before document production is completed, and documents received after the deposition raise additional questions for the witness, plaintiffs may renew the deposition upon a showing of good cause. To the extent practicable, counsel shall consult with opposing counsel and, if ethically permitted, potential deponents in an effort to schedule depositions at mutually convenient times and locations. Counsel for deponents who are employees of defendants are expected to cooperate, to the extent reasonably possible, in the scheduling of depositions requested by plaintiffs. The Court will resolve any deposition scheduling issues that Lead Counsel or their designees are unable to resolve.

(5) **Length of Direct Examination in Fact Depositions.** The examination by the party noticing the deposition of a present or former employee of a defendant shall be no more than seven (7) hours of actual examination time absent agreement or

further order of this Court upon a showing of good cause. The Court expects that if a deposition requires additional time the parties will make a good faith effort to agree on an extension before coming to the Court for resolution. Direct examinations that are reasonably believed to require more than seven hours to complete shall be scheduled, to the extent possible consistent with the witness's schedule, for sufficient consecutive days for completion.

(6) Postponements. Once a deposition has been scheduled, it shall not be taken off calendar, postponed, rescheduled, or relocated less than five (5) calendar days in advance of the date it is scheduled to occur, except upon agreement of counsel or by leave of Court for good cause shown. Given the large number of attorneys involved in this litigation, the unavailability of counsel shall not be grounds for postponing a deposition if another attorney from the same firm who is familiar with the case or one who represents a party with similar interests is available to attend. If a motion is made to permit the rescheduling of a deposition on the grounds of unavailability of counsel, the moving party shall certify to the Court that neither an attorney from the same firm who is familiar with the case nor one who represents a party with similar interests is able to attend the scheduled deposition.

(7) Attendance. Unless otherwise agreed to by the parties, depositions may be attended only by one representative of each party (other than counsel for the party), the deponent, the deponent's attorney (if not counsel for a defendant), attorneys of record in MDL 1407 or state PPA related cases, court reporters, videographers, and any person who is assisting in the litigation and whose presence is reasonably required by counsel conducting or defending the deposition. Upon application, and for good cause shown, the court may permit attendance by a person who does not fall within any of the categories set forth in the previous sentence. Attendees at any deposition shall execute an acknowledgment that they are bound by the provisions of Case Management Order No. 2. If during the course of any deposition, the examination involves information or documents which any defendant claims to be confidential pursuant to Case Management Order No. 2 entered in this litigation, attendees at the deposition are limited to those permitted access to information designated confidential pursuant to that Order. Those portions of depositions deemed confidential pursuant to said Order will be treated and handled pursuant to the requirements of that Order. Unnecessary attendance by counsel at depositions is discouraged and may not be compensated in any fee application to the Court.

(8) Production of Documents. Witnesses subpoenaed or noticed to testify and to produce documents shall be noticed and served with the subpoena or deposition notice and document request at least thirty (30) days before the scheduled deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the interrogation commences. Responsive documents that are identical to those already produced to the Plaintiffs' do not have to be produced by the deponent, but the deponent bears the burden of demonstrating, if necessary, prior production.

(9) **Potential Deposition Exhibits.** Parties will disclose to the deponent's counsel at least ten (10) days before a deposition the documents they expect to use during examination. As with issues regarding the length of depositions, the Court expects that if a party fails to disclose documents, the parties will make a good faith effort to agree how to proceed with the deposition before coming to the Court for resolution.

(10) **Location of Depositions.** Unless otherwise agreed to, any deposition of:

(a) plaintiff shall take place within the federal district in which that plaintiff resides;

(b) current and former employees and officers will take place in the federal district of such employees' or officers' place of business. Defense counsel will make reasonable efforts to obtain the agreement of former employees of defendants to appear at the same location as current employees of the same defendant. Absent such agreement, that deposition will take place either within the federal district in which the former employee resides or at a location mutually agreeable to the former employee and the parties.

H. Conduct of Depositions.

(1) **Cooperation.** Counsel are expected to cooperate with, and be courteous to, each other and deponents during the course of any deposition. Counsel shall refrain from engaging in colloquy during depositions. There shall be no smoking or use of other tobacco products or eating in any room in which a deposition is being conducted, including before, during or after a deposition, or in the deposition room during deposition recesses. Beverages will be permitted. Counsel shall recess from time to time during the deposition for meals and to permit periods of rest or refreshment reasonably required by the deponent, stenographer(s) and/or counsel conducting or defending the deposition.

(2) **Deposition Day.** Absent agreement of the parties to the deposition, a deposition day shall be no longer than seven (7) hours of actual examination time.

(3) **Continuance of Deposition.** If a deposition is not completed by 1:00 p.m. on a Friday, the deposition will recommence on the next business day, subject to the availability of the witness. If the witness is not available for deposition on the next business day, the deposition will continue on a date to be agreed upon by counsel or, if agreement cannot be reached, a date specified in a notice of continued deposition. Where a notice of continued deposition is required, service of notice ten (10) or more days prior to the date specified for the continued deposition shall be deemed adequate notice.

(4) **Examination.** The party noticing a fact deposition shall designate no more than two attorneys to conduct the examination of the deponent. If two attorneys are designated, the examinations conducted shall not be redundant or repetitive, although clarification of prior testimony may be sought if reasonably calculated to elicit testimony that adds to the substance of prior testimony. No further examination by counsel for MDL 1407 plaintiffs shall be permitted except by agreement or good cause shown. Examination by other

parties shall be permitted, but in no event shall it exceed the limitations regarding redundancy or repetition applicable to attorneys conducting the direct examination of the deponent, all as set forth above. Only one attorney may represent the deponent at any given time.

(5) **Objections and Directions Not to Answer.** Unless otherwise agreed by the parties, and noted on the record, the following stipulations shall apply to all depositions in this action:

(a) Unless otherwise specified by any defendant, an objection by a single defendant shall be deemed an objection by all defendants. However, unless otherwise specified, an instruction not to answer by one defendant should not be deemed an instruction not to answer by all defendants.

(b) All objections are reserved until trial or other use of the deposition, except those objections regarding the form of the question or the existence of a privilege. Objecting counsel shall say simply the word "objection", and no more, to preserve all objections as to form. Only if one of the examining counsel request clarification shall the basis of the objection be stated, and then only the short title of the rule (e.g., "lack of foundation" or "calls for speculation") shall be stated by objecting counsel. If the examining attorney requests further clarification, at that attorney's request the deponent shall leave the room while the detailed nature of the objection is clarified and/or discussed.

(c) Counsel shall not direct or request that a witness refuse to answer a question, unless that counsel has objected to the question on the ground that the question seeks privileged information, information that the Court has ordered may not be discovered, or a deponent seeks to present a motion to the Court for termination of the deposition on the grounds that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or harass the party or the deponent. When a privilege is claimed, the witness shall nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement was made, any other person to whom the contents of the statement has been disclosed, and the general subject matter of the communication.

(6) **Objections to Documents.** All objections to the admissibility of any documents used during the course of a deposition are deemed reserved until the time of trial or use in any dispositive motion. No objections to the use of any document are necessary or shall be noted on the record.

(7) **Private Consultations.** Private consultations between deponents and their attorneys during the course of examination are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during normal recesses and adjournments.

(8) **Disputes During Depositions.** Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental

deposition, shall be presented to the Court by telephone by calling the Court's Chambers. In the event the Judge is not available, the deposition shall continue as to matters not in dispute with full reservation of rights to continue the examination objected to pending a ruling at the earliest possible time.

If the nature of the dispute would not require the continuance of the deposition pending resolution thereof, the parties may elect to either present the matter to the Court by telephone at a time when the parties and the Court are available, or to present the dispute to the Court in writing. If the parties elect to present the dispute to the Court in writing, each side must submit on one (1) page a summary of its position and any authority relevant to the dispute. The Court will issue a prompt ruling, as its schedule permits. Nothing contained herein shall prohibit examining counsel from continuing with the deposition, filing an appropriate motion with the Court at the conclusion of thereof, and appearing personally before the Court if argument is permitted by the Court and counsel deems it necessary. Disputes between the parties should be addressed to this Court rather than to the District Court in which the deposition is being conducted.

(9) Copies of Exhibits. A copy of any document about which examining counsel expect to question the deponent should ordinarily be provided to primary counsel for the parties and the deponent at the time presented to the deponent and his/her counsel.

(10) Marking of Deposition Exhibits. Any documents previously produced by defendants or third parties used as exhibits in a deposition shall be referred to by any Bates stamp number(s) appearing on the face of the documents, and a copy thereof shall be included with the original deposition transcript. Documents that do not have Bates stamped number(s) shall be separately marked with sequential exhibit numbers. For example, if the deponent's name is "John Smith", the first exhibit to his deposition that has no identifiable Bates stamp number on its face shall be marked "Smith No. 1." The same document presented as an exhibit at subsequent depositions shall continue to be referred to as originally marked, and counsel should avoid marking that document with a different exhibit number at any subsequent deposition.

(11) Depositions Pursuant to Rule 30(b)(6). In those instances when the Plaintiffs serve a deposition notice pursuant to Fed. R. Civ. P. 30(b)(6), the following shall apply (in addition to the foregoing general procedures governing depositions):

(a) Depositions taken pursuant to F.R.C.P. 30(b)(6) will be taken pursuant to the Federal Rules of Civil Procedure and applicable case law.

(b) The party wishing to take the deposition will in good faith describe with reasonable particularity the categories on which the party is requesting examination. Within a reasonable period of time after receiving the notice, the party to be deposed will in good faith attempt to inform the discovering party if it believes that multiple witnesses will be necessary to respond to the requested categories of information and to which category each witness will be

produced to respond.

(12) **Stenographic Recording.** A certified Court reporter shall stenographically record all deposition proceedings and testimony. The Court reporter shall administer the oath or affirmation to the deponent. A written transcript by the Court reporter, together with copies of all exhibits marked or referred to during the deposition, shall constitute the official record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to the witness) and 30(f) (filing, exhibits). The transcript shall also contain the name of any attorney and any other person attending the deposition together with the name of his or her firm or organization, business address and, if applicable, the name of the person or organization he or she represents. The court reporter shall be requested to furnish the transcript in electronic form (floppy disks) in text-readable form and hard copy in Min-U-Script format to the representative of plaintiffs conducting the deposition and a designated representative of defendant attending or defending the deposition.

(13) **Videotaped Depositions.** Any deposition may be videotaped at the request of any party pursuant to notice under the following terms and conditions:

(a) All videotaped depositions shall be simultaneously stenographically recorded in accordance with this Order.

(b) The party requesting videotaping of the deposition shall bear the expense of both the videotaping and the stenographic recording. Requests for the taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

(c) The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. p. 28(c). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

(d) At the commencement of the deposition, each witness, attorney and any other person attending the deposition shall identify themselves on camera.

(e) No attorney or party shall direct instructions to the video operator as to the method of operating the equipment. The video camera operation will be suspended during the deposition only upon stipulation by counsel and "off the record" discussions. The video operator shall record on camera the time of suspension and any subsequent reconvening of the deposition.

(f) The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at trial. Unless physically incapacitated, the deponent shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent.

(g) If the party noticing the deposition does not intend to convert the videotape to digital form, the videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the depositions on the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which any interruption of continuous tape-recording occurs, whether for recesses, "off-the-record" discussions, mechanical failure, or otherwise.

(h) After the deposition is completed, the video operator shall certify on camera the correctness, completeness, and accuracy of the videotape recording in the same manner as a stenographic Court reporter, and file a true copy of the video tape, the transcript, and certificate with Liaison Counsel for whomever noticed the deposition.

(i) Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.

During the videotaping of a deposition, the questioner may use a two-video camera system with monitors available for use by counsel.

(14) **Telephonic Depositions.** By indicating in its notice of deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Fed.R.Civ.P. 30(b)(7). Unless an objection is filed and served within ten calendar days after such notice is received, the court shall be deemed to have granted the motion. Other parties may examine the deponent telephonically or in person. However, all persons present with the deponent shall be identified in the deposition and shall not by word, sign, or otherwise coach or suggest answers to the deponent.

(15) **Supplemental Depositions.** Each party who did not have reasonable notice of a fact deposition and who was not present or represented at the deposition (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this Court) may, within thirty (30) days after filing of the deposition (or, if later, within sixty (60) days after becoming a party in any action which is transferred to this Court), file a motion to conduct a supplemental deposition of the deponent. Each party who wishes to take a supplemental deposition must certify that their attorney has read the prior deposition, and state specifically the areas of inquiry not previously addressed and sought to be pursued in the deposition sought. Within fifteen (15) days of the filing of any such motion, any party may file an opposition to the motion and seek a protective order prohibiting the supplemental deposition on the grounds that the MDL 1407 deposition fully covered the area or areas sought to be explored in the supplemental deposition, that the testimony is not relevant, or any other reason thought valid.

(a) No further deposition by any party having received notice of the original deposition will be permitted, except upon order of this Court on good cause shown. A showing by the moving party that a supplemental deposition is reasonably calculated to lead to the discovery of admissible evidence

necessary to protect the interests of the moving party shall constitute good cause.

(b) If a supplemental deposition is permitted by the Court or unopposed, it shall be treated as the resumption of the deposition originally noticed. During the resumed deposition, the prohibitions regarding redundant or repetitive examination contained herein are fully applicable. The resumed deposition shall be taken at the same location as the initial deposition unless otherwise agreed to by the parties and the deponent.

(16) **Copies of Transcripts and Videotapes.** Subject to any restrictions contained within the Stipulated Confidentiality Order, any party may at its own expense obtain a copy of the videotape and the stenographic transcript by contacting counsel noticing the deposition or the court reporter.

(17) **Correction and Signing Depositions.** Unless waived by the deponent, the transcript of a deposition, or any portion thereof, shall be submitted to the deponent for correction and signature within thirty (30) days after the completion of the deposition or any portion thereof, unless the Court allows a supplemental deposition pursuant to this Order. If a supplemental deposition is allowed, the transcript thereof shall be submitted to the deponent as soon as it is available for distribution. A deposition transcript, or a transcript of a portion thereof, may be signed by the deponent before any notary within thirty (30) days after the transcript, or any portion thereof, is submitted to the deponent. If no corrections are made during this time, the transcript will be presumed accurate.

(18) **Use of Depositions.** Under the conditions prescribed in Fed. R. Civ. P. 32(a) (1) - (4) or as otherwise permitted by the Federal Rules of Evidence, depositions may be used against any party (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this Court as part of this litigation) who:

(a) was present or represented at the deposition; or

(b) had reasonable notice thereof, or

(c) within ninety (90) days after the deposition is taken or within one hundred and twenty (120) days after becoming a party to MDL 1407 fails to show just cause why such deposition should not be used against such party.

(19) **Document Subpoenas to Non-Parties.** Commencing upon entry of this Order, any party may serve subpoenas on non-parties for the production of documents without testimony pursuant to Fed. R. Civ. P. 45.

VI. FACT DISCOVERY OF PLAINTIFFS.

Plaintiffs and Defendants, through their appointed Lead Counsel, are to confer regarding the nature and extent of discovery of plaintiffs in MDL 1407, as well as deadlines and proposed procedures for the conduct of same, and to report back to the Court at the earliest practical time as agreed by Lead Counsel, but no later than thirty (30) days from the date of this Order or the next regularly scheduled Status Conference, whichever first occurs. Plaintiffs, however, shall produce copies of any medical records in their possession referring or related to the injuries alleged in

their actions within 30 days of the entry of an Order concerning discovery of plaintiffs or sixty (60) days from the date of this Order, whichever first occurs.

VII. EXPERT DISCOVERY

To date, the parties have not agreed whether science and/or expert witness issues involved in this litigation should be resolved in this MDL and, if so, the nature, extent and procedures of discovery regarding those issues and/or experts. However, the parties have agreed to continue to attempt to reach an agreement on these issues within the proposed Joint Science Committee, all as proposed in the Joint Submission of the parties dated November 30, 2001. The Joint Science Committee shall meet and shall report to the Court on or before January 11, 2002. At that time, the committee shall provide the Court with a recommended expert discovery schedule, including an expert cutoff date. If the committee cannot reach an agreement, it shall report the disagreement to the Court on January 11, 2002, and shall submit separate proposals by January 18, 2002.

VIII. FAILURE TO COMPLY WITH DISCOVERY REQUESTS.

A party's failure to either produce a relevant document or identify same as withheld pursuant to a privilege may be viewed by the Court as an infraction of its orders, justifying appropriate sanctions. Upon learning of any relevant document(s) which have not been produced or identified, a party is under an obligation to promptly make known the existence of the documents, including the reason for failing to produce same, and submit the document to opposing Lead Counsel, or if withheld under a claim of privilege or protection, identify the documents and the corresponding privilege in the manner described above.

IX. PRODUCTION OF DOCUMENTS FROM PRIOR LITIGATION.

The parties shall meet and confer to resolve disputes over the extent of discovery of documents from prior litigation and shall provide the Court with an agreement by January 11, 2002. If the parties are unable to agree on the extent of discovery, they shall submit separate proposals by January 18, 2002.

X. CLASS ACTIONS.

A. Economic Injury Class Actions. As of the date of this Order, the Court lifts the stay imposed on potential class certification proceedings. Plaintiffs in *Sims v. The Delaco Company et al.* (C01-1705R) have agreed to voluntarily dismiss their complaint.

(1) Class Certification Discovery and Briefing Schedule. The defendants and plaintiffs shall meet and confer regarding potential stipulations, a discovery plan, and a briefing schedule for the economic injury class certification issue. Counsel shall contact the Court on or before January 7, 2002, to inform the Court of the agreed schedule or, if agreement cannot be reached, to present separate proposals.

(2) Merits Discovery and Other Deadlines. Non-expert merits discovery shall end on December 31, 2002. Merits discovery in the class actions shall be coordinated with merits discovery in the personal injury actions, so that no duplicative discovery shall be taken and so that discovery taken in non-MDL cases shall be applicable in the class actions to the same extent that it is applicable in the MDL personal injury

actions. To the extent that relevant merits discovery commences in the personal injury actions before the Court rules on the class certification issue in the economic injury class actions, the parties in the economic injury class actions can and shall participate so as to avoid duplicative discovery.

A schedule for expert discovery, Daubert motions, summary judgment motions and remaining dates applicable in the class action cases shall be set at a later date.

B. Personal Injury Class Actions. Defendants shall file a motion to strike class allegations on or before January 25, 2002. If plaintiffs contend discovery is necessary before they can respond to defendants' motion, plaintiffs shall file their motion for discovery by February 1, 2002. The motion should include the specific areas of discovery required and the reason discovery is needed, as well as proposed dates for discovery. Defendants may file a response to the discovery motion by February 8, 2002. No reply will be filed.

If the Court denies the motion for discovery, plaintiffs shall file their opposition to defendants' motion to strike class allegations within seven (7) days of receiving the Court's decision. The defendants' reply shall be filed within fourteen (14) days of receiving the opposition, and any sur-reply by the plaintiffs shall be due fourteen (14) days after receiving the reply. If the Court grants the motion for discovery, the parties shall follow the briefing schedule provided by the Court in that order.

If the plaintiffs do not bring a motion for discovery, plaintiffs shall file their opposition to the motion to strike class allegations on February 28, 2002. Defendants shall file their reply on March 15, 2002, and plaintiff shall file any sur-reply by March 29, 2002.

XI. OTHER PROVISIONS

A. Individual Appointment of Plaintiff Counsel. The Court has appointed specific plaintiffs counsel to various positions on the expectation of their personal contribution to the work of the Plaintiffs' Lead Counsel, Steering Committee ("PSC") and other Committees and to the furtherance of the completion of the MDL portion of PPA litigation. For this reason, the Court will look to the Lead Counsel and the individual members of the Plaintiffs' various committees to satisfy the goals that the Court expects the PSC and the various Committees to achieve. The Court will likewise consider the contribution of each member of the PSC and its Committee members when the Court is called upon to determine appropriate compensation for service on the PSC and its Committees. While the Court recognizes that each of the above members will require the assistance of partners, colleagues, paralegals, support staff and others in the fulfillment of their committee assignments, the Court will expect the individual members to be responsible for the ultimate outcome of the activities performed by the PSC and its Committees.

B. Time and Expense Keeping. Counsel who anticipate seeking an award of attorney's fees and reimbursement of expenditures shall comply with the directives contained in the Manual for Complex Litigation, Third, §41.32 regarding the maintenance of contemporaneous records reflecting the services performed and the expenses incurred. The Court will address, in a

future CMO, the extent to which an assessment will be ordered in this matter.

C. Privileges Preserved. No communication by and between the respective parties' Lead Counsel, their Liaison Counsel and/or members of their respective Committees shall constitute a waiver of any privilege or protection to which it would otherwise be entitled.

XII. NEXT STATUS CONFERENCE.

The next status conference is scheduled for _____.

At the next and all future status conferences, the parties are to provide to the Court within five (5) business days before each status conference an agreed upon agenda for the conference, and shall provide a brief (1-2 paragraph) summary of the party positions as to any disputed issues.

XIII. PERSONS BOUND BY THIS ORDER.

This Order shall be binding on all persons with

cases docketed in MDL 1407.

/s/

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC.,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO., INC., SMOOTHIE KING SYSTEMS,
INC., and WALGREEN LOUISIANA CO.,
INC. (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-CV-2436
*
* JUDGE ENGELHARDT
*
* MAGISTRATE JUDGE SHUSHAN
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*
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*

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF BILL CARSON

PLEASE TAKE NOTICE that Plaintiffs will take the deposition upon oral examination of Mr. Bill Carson, now or formerly an employee of Bayer Corporation, on September 26, 2002, at the law office of Fulbright & Jaworski, 666 Fifth Avenue, New York, NY (212-318-3000, www.fulbright.com), beginning at 9 00 a.m. and continuing until completed.


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____ Clr'd _____
____ Doc No. *8*

The deposition will be conducted pursuant to the provisions of Case Management Order No 1,¹ will be stenographically recorded by the court reporting firm of Tate & Tate, 180 Tuckerton Road, Suite 5, Medford, NJ 08055 and will be videotaped by Lawyers' Video Service, Inc , 33 Rock Hill Road, Bala Cynwyd, PA 19004 The examination will also be videotaped by Veritext, 25B Vreeland Road, Florham Park, NJ 07932, which will have a video camera trained on the questioner during the examination Steven Rotman and/or Michelle Parfitt or James Green will represent plaintiffs

You are at liberty to appear and examine the witness

DATED this 4th day of September, 2002

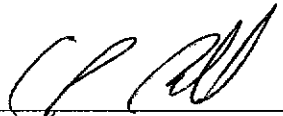
Respectfully submitted,



Mary L. Meyer, Esq (19966)
John F. Olnde (1515)
Charles P. Blanchard (18798)
**CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of September, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery, facsimile, or by depositing the same in the United States mail, properly addressed, and first-class postage prepaid



¹ A copy of the Case Management Order No 1 is attached to a prior Cross-Notice of Deposition filed in this case

9/18

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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UNITED STATES DISTRICT COURT

LORETTA G. WHYTE
CLERK

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY
AND JEROME DONNELLY, HUSBAND

* CIVIL ACTION NO
* 02-2436
*

VERSUS

* SECTION " N "
*

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORP , NOVARTIS
CONSUMER HEALTH, INC , 4LIFE RESEARCH,
L C SUCCESSOR BY MERGER TO SHAPERITE
SMOOTHIE KING CO , SMOOTHIE KING
SYSTEMS, INC , WALGREEN LOUISIANA
COMPANY, INC (D/B/A "WALGREENS")

* MAGISTRATE "1"
*
*
*
*
*
*

MOTION TO DISMISS PURSUANT TO F. R. C. P. 12(b)(6)

NOW INTO COURT, through undersigned counsel, comes defendant, Walgreen Louisiana Company, Inc (hereafter "Walgreens"), and respectfully moves this Honorable Court to dismiss the Petition for Damages of plaintiffs The claims of plaintiffs have failed to state a cause of action against the defendant upon which relief can be granted Therefore, defendant is entitled to a dismissal with prejudice

Respectfully submitted,

THE TRUITT LAW FIRM
A Limited Liability Company

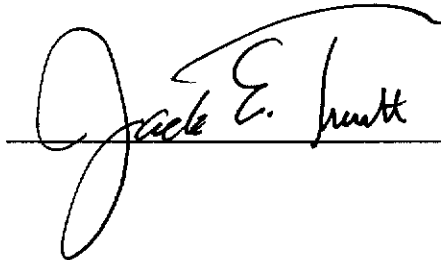
Jack E. Truitt
JACK E TRUITT, BAR NO 18476, T A
251 Highway 21
Madisonville, Louisiana 70447
Telephone (985) 792-1062
Facsimile (985) 792-1065
Email mail@truittlaw.com

Counsel for Walgreen Louisiana Company, Inc

7/10/02
7/10/02
7/10/02

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served on all counsel of record by depositing same into the U S Mail, postage pre-paid, this August 27, 2002, or by any other means authorized by law

A handwritten signature in cursive script, reading "Jack E. Hunt", is written over a horizontal line. The signature is fluid and stylized, with the first letter of each name being capitalized and prominent.

Plaintiffs, Daphine B Donnelly and Jerome Donnelly, claim that on January 12, 1991, Ms Donnelly, had a prescription filled at a Walgreen's Drugstore, location not specified in the Petition for Damages She claims that an employee of Walgreen's incorrectly filled her prescription Plaintiffs claim that they have suffered damages as a result of the negligent acts of the Walgreen's pharmacist Plaintiffs did not file suit in this Honorable Court until July 2, 2002 Defendant, Walgreen Louisiana Company, Inc , contends that the claims of plaintiffs are clearly prescribed on the face of the Petition for Damages Therefore, this Honorable Court must grant the Motion to Dismiss

Argument

Pursuant to Article 3492 of the Louisiana Civil Code, a delictual action must be filed within one year "from the day injury or damage is sustained " F R C P Rule 12 (b)(6) provides that a court should dismiss a plaintiff's complaint for failure to state a claim upon which relief can be granted.

In this case, plaintiff contends that the Walgreen's pharmacist negligently filled a prescription on January 12, 1991 However, the lawsuit was not filed in this Honorable Court until July 2, 2002 Therefore, plaintiffs' lawsuit is untimely and must be dismissed based upon the Motion to Dismiss

Conclusion

Plaintiffs' lawsuit is clearly prescribed as it was not filed within one year from the date that an alleged injury was sustained as a result of the alleged wrongful acts of the defendant Therefore, this Honorable Court must grant the Motion to Dismiss

Respectfully submitted,

THE TRUITT LAW FIRM

A Limited Liability Company

A handwritten signature in black ink, appearing to read "Jack E. Trutt", is written over a horizontal line.

JACK E TRUITT, BAR NO 18476, T A

251 Highway 21

Madisonville, Louisiana 70447

Telephone (985) 792-1062

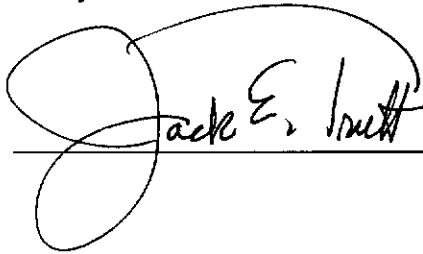
Facsimile (985) 792-1065

Email: mail@truittlaw.com

Counsel for Walgreen Louisiana Company, Inc

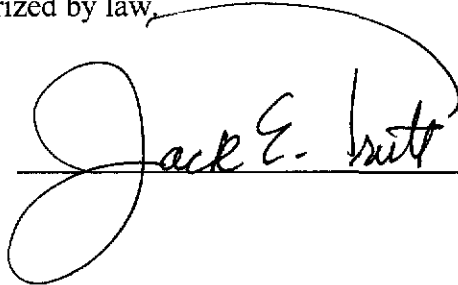
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served on all counsel of record by depositing same into the U S Mail, postage pre-paid, this August 27, 2002, or by any other means authorized by law



CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served on all counsel of record by depositing same into the U S Mail, postage pre-paid, this August 27, 2002, or by any other means authorized by law.

A handwritten signature in cursive script, reading "Jack E. Hunt", is written over a horizontal line. The signature is fluid and stylized, with a large loop at the beginning and a trailing flourish.



CASE: 2 02-cv-02436/P
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*** There will be no noticing for this document.***

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, ET VIR

CIVIL ACTION NO 02-CV-2436

VERSUS

SECTION N - JUDGE ENGELHARDT

BAYER CORPORATION, ET AL

MAGISTRATE JUDGE SHUSHAN

ANSWER OF DEFENDANT, 4LIFE RESEARCH, LC

Defendant, 4Life Research, LC, through its undersigned counsel, answers
plaintiffs' removed petition thus

1

It denies ¶1 for lack of knowledge and information sufficient to justify a belief in
the truth thereof

2

It denies §D and is not required to admit or deny the remainder of ¶2

3

It is not required to admit or deny ¶3

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4

It denies ¶4

5

It denies ¶5 as written

6

It denies ¶6 as written

7

It denies ¶7

8

It denies ¶8 for lack of knowledge and information sufficient to justify a belief in the truth thereof

9

It denies ¶9 as written

10

It denies ¶10 for lack of knowledge and information sufficient to justify a belief in the truth thereof.

11

It denies ¶11

12

It denies ¶12 for lack of knowledge and information sufficient to justify a belief in the truth thereof

13

It denies ¶13 for lack of knowledge and information sufficient to justify a belief in the truth thereof

14

It denies ¶14 for lack of knowledge and information sufficient to justify a belief in the truth thereof

15

It denies ¶15

16

It denies ¶16

17

It denies ¶17

15[sic]

It denies ¶15[sic]

16[sic]

It denies ¶16[sic]

17[sic]

It denies ¶17[sic] for lack of knowledge and information sufficient to justify a belief in the truth thereof

AND NOW, FURTHER ANSWERING, defendant avers that

21

Plaintiffs' complaint fails to state a claim upon which relief can be granted against this defendant

22

Plaintiffs' cause of action, if any, has prescribed by operation of law

23

There is no causal connection between defendant's product and plaintiffs' alleged injuries and damages because Mrs. Donnelly's January 12, 1991 stroke occurred before defendant's product was on the market

24

Plaintiffs' alleged injuries and damages were caused, in whole or in part, by the acts or omissions of others over whom this defendant had no control and for whom this defendant bears no liability or responsibility

25

Plaintiffs' alleged injuries were caused by intervening and/or superceding causes that were the proximate and/or sole causes of the plaintiffs' alleged injuries

26


Plaintiffs' alleged damages were caused by their own fault, neglect, and/or want of care, which is specifically pled herein as a bar or in diminution of recovery

WHEREFORE, defendant, 4Life Research, LC, prays that plaintiffs' action be dismissed with prejudice at their costs and for any and all other general and equitable relief

Respectfully Submitted,

LEMLE & KELLEHER, L.L.P

By


C. WM. BRADLEY JR. (#3371)
J. DON KELLY JR. (#25124)
601 Poydras St., Ste 2100
New Orleans, LA 70130-6097
Telephone (504) 584-9170
Fax (504) 584-9142
Attorneys for defendant,
4Life Research, LC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading has been served on all known counsel for all parties to this litigation by United States Mail, properly addressed and postage prepaid, or hand-delivery, on this 22 day of August, 2002


J. DON KELLY JR.



CASE: 2 02-cv-02436/P
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DATE: 08/23/02
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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 AUG 21 PM 4:03
LORENA G. RHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
*
* NO 02-CV-2436
*
* JUDGE ENGELHARDT
*
* MAGISTRATE JUDGE SHUSHAN
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**BAYER CORPORATION'S MOTION FOR DISMISSAL
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

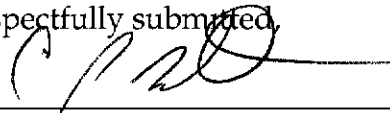
NOW INTO COURT, through undersigned counsel, comes defendant Bayer Corporation ("Bayer"), who respectfully moves the Court for dismissal, pursuant to Federal Rule of Civil Procedure 12(b)(6), of plaintiffs' claims in negligence, gross negligence and strict liability on the grounds that they fail to state claims upon which relief can be granted The Louisiana Products Liability Act ("LPLA"), La R S 9 2800 51 *et seq* , establishes the exclusive theories of recovery

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against a manufacturer, and it does not provide for the recovery of the aforementioned claims

The grounds for this motion are more fully set forth in the attached memorandum

Respectfully submitted,



Mary L Meyer (La Bar No 19966)

John F Olinde (La Bar No 1515)

Charles P Blanchard (La Bar No 18798)

CHAFFE, McCALL, PHILLIPS,

TOLER & SARPY, L.L.P.

2300 Energy Centre, 1100 Poydras Street

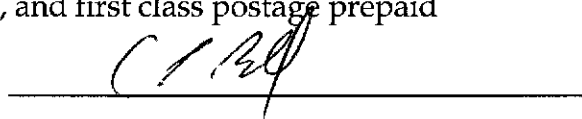
New Orleans, LA 70163-2300

Telephone No (504) 585-7000

Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 21st day of August, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid



UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* * * * *

* CIVIL ACTION
*
* NO 02-CV-2436
*
* JUDGE ENGLEHARDT
*
* MAGISTRATE JUDGE SHUSHAN
*
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*

**MEMORANDUM IN SUPPORT OF
BAYER CORPORATION'S MOTION FOR DISMISSAL
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

1. Factual Background

The plaintiffs make numerous claims in their Petition against Bayer Corporation ("Bayer"), all of which are based on the premise that Bayer sold and advertised Alka Seltzer Plus medicine, which contained phenylpropanolamine (PPA) *See* Petition, ¶¶ 2, 9

The plaintiffs allege that Daphine Donnelly's ingestion of Bayer's products containing PPA caused her to suffer a stroke on January 12, 1991 *See* Petition, ¶ 10 Plaintiffs have made a claim against Bayer as a manufacturer under the provisions of the Louisiana Products Liability

Act ("LPLA"), La R S 9 2800 51 *et seq* See Petition, ¶ 15 They have also asserted claims against Bayer in negligence, gross negligence and strict liability See Petition, ¶ 16 Plaintiffs' causes of action against Bayer are limited to those expressly available under the LPLA The LPLA does not allow recovery under theories of negligence, gross negligence and strict liability Accordingly, the Court should dismiss all of these claims for failure to state a claim upon which relief can be granted

2. Standards applicable to a Motion to Dismiss for Failure to State a Claim under Federal Rule of Civil Procedure 12(b)(6).

The Court should dismiss a plaintiff's complaint for failure to state a claim under Rule 12(b)(6) when the plaintiff fails to plead specific facts entitling her to relief Conclusory allegations or legal conclusions do not suffice See, e g, *Campbell v City of San Antonio*, 43 F 3d 973, 975 (5th Cir 1995), *Blackburn v City of Marshall*, 42 F 3d 925, 931 (5th Cir 1995)

The plaintiff's complaint must contain direct allegations on every material point necessary to sustain recovery or contain allegations from which an inference fairly can be drawn that evidence on these material points will be introduced at trial *Campbell v City of San Antonio*, 43 F 3d at 975 Dismissal is proper if the complaint lacks allegations regarding a required element necessary to obtain relief The Court is not required to "conjure up unpled allegations or construe elaborately archaic scripts" to save a complaint *Campbell*, 43 F 3d at 975, quoting *Gooley v Mobil Oil Corp*, 851 F 2d 513, 514 (1st Cir 1988)

In deciding a motion to dismiss for failure to state a claim, courts generally limit their inquiry to the facts stated in the complaint and the documents attached to or incorporated in the complaint See, e g, *Lovelace v Software Spectrum, Inc*, 78 F 3d 1015, 1017 (5th Cir 1996)

But the Court may also consider documents that the plaintiff references in her complaint that are central to her claims, even if not attached. *See, e.g., Greenberg v Life Ins Co of Virginia*, 177 F 3d 507, 514 (6th Cir 1999) (insurance policies attached to motion to dismiss could be considered in deciding a motion to dismiss because the plaintiff referred to the policies in the complaint and the policies were central to the plaintiff's claims)

Applying these standards, plaintiffs' factual pleadings fail to state numerous causes of action and those causes of action should be dismissed.

3. The Louisiana Products Liability Act Is The Controlling Substantive Law

The LPLA¹ became effective on September 1, 1988 and controls plaintiffs' claims against Bayer in this diversity action. *Stevens v Witco Corp*, 198 F 3d 539 (5th Cir 1999) ("because the basis for federal jurisdiction in this case is diversity of citizenship, Louisiana substantive law applies") Under the LPLA, plaintiff has the burden of proving that an allegedly defective product was unreasonably dangerous in one of four ways: 1) construction or composition, 2) design, 3) because of an inadequate warning, or 4) because of nonconformity to an express warranty.² *Ashley v General Motors Corp*, 22, 851 (La App 4th Cir 5/16/95), 666 So 2d 1320, 1322

4. All of Plaintiffs' Non-LPLA Causes of Action Against Bayer Must be Dismissed

A claimant may not recover from a manufacturer for damage caused by a product on the basis of any theory of liability that is not set forth in the LPLA. The LPLA expressly provides "A claimant may *not* recover from a manufacturer for damage caused by a product on the basis of *any* theory of liability *not* set forth in the LPLA." La R S 9 2800 52 (emphasis added). Based

¹ La R S 9 2800 51 *et seq*
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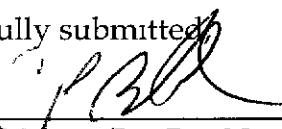
on this unequivocal statutory language, courts routinely dismiss claims against manufacturers that do not arise under the LPLA. *See, e.g., Jefferson v Lead Industries*, 106 F.3d 1245, 1251 (5th Cir. 1997) (affirming dismissal of plaintiff's claims of negligence, fraud by misrepresentation, market share liability, breach of implied warranty of fitness, and civil conspiracy due to exclusivity of the LPLA), *Brown v R J Reynolds Tobacco Co.*, 852 F.Supp. 8, 9 (E.D. La. 1994), *aff'd*, 52 F.3d 524 (5th Cir. 1995) (dismissing plaintiff's claims for fraudulent misrepresentation, concealment, and conspiracy due to LPLA's exclusivity), *Grenier*, 99 F.Supp.2d 759, 765-63 (W.D. La. 2000), *aff'd*, 243 F.3d 200 (5th Cir. 2001) (holding that plaintiff's claims for strict liability, negligence, breach of warranty of fitness for particular purpose, breach of implied warranty, misrepresentation, fraud by concealment, false advertising, negligent infliction of emotional distress, common plan to prevent public awareness of breast implant hazards, and future product failure were not cognizable under the LPLA). The plaintiff's claims in this case for negligence, gross negligence and strict liability are "well outside the scope of the LPLA and must be dismissed." *Grenier*, 99 F.Supp. 2d at 763.

CONCLUSION

For the foregoing reasons, plaintiffs' causes of actions for negligence, gross negligence and strict liability fail to state claims upon which relief can be granted against Bayer Corporation and should be dismissed.

² La. R.S. 9:2800.54(b)
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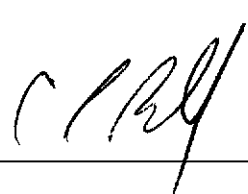
Respectfully submitted,



Mary L. Meyer, (La. Bar No 19966)
John F. Olinde, (La. Bar No 1515)
Charles P. Blanchard, (La. Bar No 18798)
**Chaffe, McCall, Phillips,
Toler & Sarpy, L.L.P.**
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2300
Telephone (504) 585-7000
Attorneys for Bayer Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding by mailing a copy of same to each by First Class United States mail, properly addressed and postage prepaid, on this 21st day of August, 2002



UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

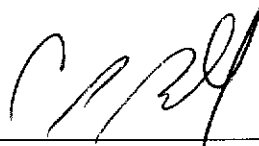
BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ,
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
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* CIVIL ACTION
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* NO 02-CV-2436
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* JUDGE ENGELHARDT
*
* MAGISTRATE JUDGE SHUSHAN
*
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*

NOTICE OF HEARING

PLEASE TAKE NOTICE that Bayer Corporation, will bring on for hearing on September 18, 2002, at 9 30 o'clock a m , before the Honorable Kurt D Engelhardt at the United States District Courthouse for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, the accompanying Motion for Dismissal

Respectfully submitted,



Mary L. Meyer, Esq (19966)
John F. Olnde, Esq (1515)
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L L P
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
Telephone (504) 585-7000

**ATTORNEYS FOR
BAYER CORPORATION**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid, this 21st day of August, 2002





CASE 2:02-cv-02436/P
DOCUMENT. 5
DATE 08/22/02
CLERK: tbl

*** There will be no noticing for this document.***

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 AUG 14 PM 3:58

LORETTA G. WHYTE
CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, ET AL.

*

CIVIL ACTION

*

NO.: 02-cv-2436

*

v.

*

JUDGE ENGELHARDT

*

BAYER CORPORATION, ET AL.

*

MAGISTRATE SHUSHAN

*

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ANSWER OF DEFENDANT NOVARTIS PHARMACEUTICALS CORPORATION
TO PLAINTIFF'S PETITION FOR DAMAGES

Defendant Novartis Pharmaceuticals Corporation ("NPC") responds to Plaintiff's *Petition for Damages* (the "Petition") as follows

FIRST DEFENSE

The Petition fails to state a cause of action or claim for which relief can be granted.

SECOND DEFENSE

Any claims against NPC as set forth in the Petition that allege a right to recovery on a theory of liability other than one of the exclusive theories of liability set forth in the Louisiana Products Liability Act, fail to state a cause of action or claim for which relief can be granted

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4/1

THIRD DEFENSE

The claims are barred by prescription, applicable statute of limitations, statute of repose, or the passage of time

FOURTH DEFENSE

Any claims for fraudulent misrepresentation, suppression, fraud, concealment, and deceit are not pleaded with particularity as required by law, and thus fail to state a cause of action or claim for which relief can be granted

FIFTH DEFENSE

The claims are barred because NPC is not subject to the personal jurisdiction of this District Court

SIXTH DEFENSE

The claims are barred because plaintiff, by electing to ingest Tavist-D® assumed the risks apparent or disclosed on the Tavist-D® label, and plaintiff waived and/or is estopped from asserting any claim related to such risks

SEVENTH DEFENSE

The claims are barred because Tavist-D® is designed, manufactured, marketed and labeled with proper warnings, information, cautions and instructions, in accordance with the state of the art and the state of scientific and technological knowledge.

EIGHTH DEFENSE

Any losses are subject to an offset or credit in the amount of any reimbursement received by plaintiffs as a result of any insurance or other health benefits plan, or any amounts paid for by any insurance or other health benefits plan

NINTH DEFENSE

The claims are barred because the injuries, damages and losses alleged in the Petition, none being admitted, were proximately caused, in whole or in part, by the fault or negligence of the plaintiff or others. Accordingly, the claims are barred or must be reduced under the doctrine of contributory or comparative fault.

TENTH DEFENSE

The claims are barred because the injuries, if any, were the result of conduct of plaintiff, independent third parties, or events that were extraordinary under the circumstances, not foreseeable in the normal course of events, and/or independent, intervening and superseding causes, including but not limited to pre-existing medical conditions.

ELEVENTH DEFENSE

Discovery may show that the claims are barred by the "learned intermediary" or "informed intermediary" doctrine

TWELFTH DEFENSE

The Petition fails to state a cause of action because the medical drugs at issue were properly prepared and accompanied by proper directions and warnings, and thus not defective or unreasonably dangerous.

THIRTEENTH DEFENSE

Any alleged negligent or culpable conduct of NPC, none being admitted, was too insubstantial to be a legal, proximate or substantial contributing cause of the alleged injuries

FOURTEENTH DEFENSE

The claims against NPC are barred because the alleged injuries, if caused by PPA, are the result of plaintiff's own idiosyncratic or allergic reactions

FIFTEENTH DEFENSE

Discovery may show that the damages, if any, are limited by the failure to mitigate

SIXTEENTH DEFENSE

The claims are barred because the defendant complied with all federal and state statutes as well as all administrative regulations

SEVENTEENTH DEFENSE

The claims are barred because Tavist-D® is comprehensively regulated by the United States Food and Drug Administration pursuant to the Federal Food, Drug & Cosmetic Act, 21 U.S.C. §§ 301 et seq., and regulations and orders promulgated thereunder. Accordingly, the claims are preempted by the Supremacy Clause of the United States Constitution, Article VI, clause 2, and the laws of the United States.

EIGHTEENTH DEFENSE

NPC has no legal relationship or privity with plaintiff and owes no duty to plaintiff by which liability could be attributed to it.

NINETEENTH DEFENSE

The claims are barred because the use of Tavist-D® was generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

TWENTIETH DEFENSE

Discovery may show that the claims are barred by the misuse or abnormal use of Tavist-D® or the failure to follow product instructions.

TWENTY-FIRST DEFENSE

Plaintiffs' claims are barred because at no relevant time did NPC manufacture, promote, market, advertise, distribute or sell the product at issue

TWENTY-SECOND DEFENSE

Plaintiffs' claims are barred because NPC is not a proper party and it has no liability concerning the product at issue – any and all assets and liabilities concerning the product at issue are possessed by a separate legal entity

TWENTY-THIRD DEFENSE

NPC hereby gives notice that it intends to rely upon such other defenses as may become available or apparent during the course of discovery and thus reserves its right to amend this list to assert such defenses

NPC DENIES THE ALLEGATIONS IN THE INITIAL PARAGRAPH OF THE PETITION AND SPECIFICALLY RESPONDS TO THE NUMBERED ALLEGATIONS OF THE PETITION FOR DAMAGES, AS FOLLOWS

1 Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 1 of the *Petition for Damages*

2. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 2 of the *Petition for Damages*, except admits that Novartis Pharmaceuticals Corporation is a Delaware Corporation with its principal place of business in New Jersey NPC further states that after January 1, 1997, NPC, f/k/a Sandoz Pharmaceutical Corporation, did not supply, manufacture, label, distribute, promote or sell Tavist-D®. Further, on January 1, 1997, all assets and liabilities of NPC's over-the-counter business, including Tavist-D® products, were transferred to Novartis Consumer Health, Inc.

3 Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 3 of the *Petition for Damages*

4. The allegations in paragraph 4 of the *Petition for Damages* are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is required, NPC denies the allegations in paragraph 4.

5 Denies knowledge or information sufficient to form a belief as to the

allegations in paragraph 5 of the *Petition for Damages*, except states upon information and belief, that PPA has been used in the United States in over-the-counter decongestant cough and cold products and appetite suppressants. NPC further states upon information and belief that Tavist-D® contained PPA until or about November 2000.

6 Denies the allegations in paragraph 6 of the *Petition for Damages*, except admits that a report entitled “PPA & Risk of Hemorrhagic Stroke: Final Report of the Hemorrhagic Stroke Project” was published on or about May 10, 2000. NPC respectfully refers the Court to the said report for the contents therein. NPC further states that there have been anecdotal reports of strokes in patients who have used a product containing PPA, but that no causal link has been established between the use of PPA and stroke, and respectfully refers the Court to the studies and/or published reports referenced by plaintiff for the contents thereof.

7 Denies the allegations in paragraph 7 of the *Petition for Damages*.

8. Denies the allegations in paragraph 8 of the *Petition for Damages*.

9 Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 9 of the *Petition for Damages*.

10 Denies the allegations in paragraph 10 of the *Petition for Damages*, except denies knowledge or information sufficient to form a belief as to plaintiff's medical history.

11 Denies the allegations in paragraph 11 of the *Petition for Damages*, and

further states that there have been anecdotal reports of strokes in patients who have used a product containing PPA, but that no causal link has been established between the use of PPA and stroke

12. Denies the allegations in paragraph 12 of the *Petition for Damages*, except denies knowledge or information sufficient to form a belief as to plaintiff's medical history

13 Denies the allegations in paragraph 13 of the *Petition for Damages*.

14. Denies the allegations in paragraph 14 of the *Petition for Damages*.

15 Denies the allegations in paragraph 15 of the *Petition for Damages*, including subparts therein.

16. Denies the allegations in paragraph 16 of the *Petition for Damages*.

17 Denies the allegations in paragraph 17 of the *Petition for Damages*, including subparts therein.

18 Denies the allegations in paragraph 18 (that is incorrectly numbered as paragraph 15 on page 6) of the *Petition for Damages*

19. Denies the allegations in paragraph 19 (that is incorrectly numbered as paragraph 16 on page 6) of the *Petition for Damages*

20 The allegations in paragraph 20 (that is incorrectly numbered as paragraph 17 on page 6) of the *Petition for Damages* are legal conclusions to which no responsive pleading is required To the extent a responsive pleading is required, NPC denies the allegations in paragraph 20

of the *Petition for Damages*

21 NPC denies any allegation in the Petition not expressly admitted herein.

22 NPC requests trial by jury

BY: Eric R. Nowak

Sessions, Fishman & Nathan, L L P.

JOY GOLDBERG BRAUN (#3416) T.A.

ERIC R. NOWAK (#27025)

SHIRIN E. HARRELL (#27495)

201 St Charles Avenue, Suite 3500

New Orleans, LA 70170-3500

and

Randolph S Sherman

Lori B Leskin

Danielle E Finck

KAYE SCHOLER LLP

425 Park Avenue

New York, New York 10022

Attorneys for Defendant

NOVARTIS PHARMACEUTICALS CORPORATION

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 14th day of August, 2002, served a copy of the foregoing pleading by facsimile and U S Mail to plaintiff's counsel, and by U.S mail, to all other counsel for the parties to this, properly addressed, and first class postage prepaid

Eric R. Nowak

ERIC R NOWAK



CASE: 2.02-cv-02436/P
DOCUMENT: 4
DATE 08/15/02
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*** There will be no noticing for this document.***

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2002 AUG 14 PM 3:58

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CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|------------------------------|---|--------------------|
| DAAPHINE B. DONNELLY, ET AL. | * | CIVIL ACTION |
| | * | NO.: 02-cv-2436 |
| | * | |
| v. | * | JUDGE ENGELHARDT |
| | * | |
| BAYER CORPORATION, ET AL. | * | MAGISTRATE SHUSHAN |
| | * | |
| * * * * * | * | |

**ANSWER OF DEFENDANT NOVARTIS CONSUMER HEALTH, INC.
TO PLAINTIFF'S PETITION FOR DAMAGES**

Defendant Novartis Consumer Health, Inc ("NCH") responds to Plaintiff's *Petition for Damages* (the "Petition") as follows

FIRST DEFENSE

The Petition fails to state a cause of action or claim for which relief can be granted

SECOND DEFENSE

Any claims against NCH as set forth in the Petition that allege a right to recovery on a theory of liability other than one of the exclusive theories of liability set forth in the Louisiana Products Liability Act, fail to state a cause of action or claim for which relief can be granted

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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THIRD DEFENSE

The claims are barred by prescription, applicable statute of limitations, statute of repose, or the passage of time

FOURTH DEFENSE

Any claims for fraudulent misrepresentation, suppression, fraud, concealment, and deceit are not pleaded with particularity as required by law, and thus fail to state a cause of action or claim for which relief can be granted

FIFTH DEFENSE

Discovery may show that the claims are barred by the misuse or abnormal use of Tavist-D® or the failure to follow product instructions.

SIXTH DEFENSE

The claims are barred because plaintiffs, by electing to ingest Tavist-D® assumed the risks apparent or disclosed on the Tavist-D® label, and plaintiffs waived and/or is estopped from asserting any claim related to such risks

SEVENTH DEFENSE

The claims are barred because Tavist-D® was designed, manufactured, marketed and labeled with proper warnings, information, cautions and instructions, in accordance with the state of the art and the state of scientific and technological knowledge

EIGHTH DEFENSE

Any losses are subject to an offset or credit in the amount of any reimbursement received by plaintiff as a result of any insurance or other health benefits plan, or any amounts paid for by any insurance or other health benefits plan

NINTH DEFENSE

The claims are barred because the injuries, damages and losses alleged in the Petition, none being admitted, were caused in whole, in part or proximately by the fault or negligence of the plaintiffs or others. Accordingly, the claims are barred or must be reduced under the doctrine of contributory or comparative fault

TENTH DEFENSE

The claims are barred because the injuries, if any, were the result of conduct of plaintiffs, independent third parties, or events that were extraordinary under the circumstances, not foreseeable in the normal course of events, and/or independent, intervening and superseding causes of the alleged injuries, including but not limited to pre-existing medical conditions.

ELEVENTH DEFENSE

Discovery may show that the claims are barred by the "learned intermediary" or "informed intermediary" doctrine

TWELFTH DEFENSE

The Petition fails to state a cause of action because the medical drugs at issue were properly prepared and accompanied by proper directions and warnings, and thus not defective or unreasonably dangerous

THIRTEENTH DEFENSE

Any alleged negligent or culpable conduct of NCH, none being admitted, was so insubstantial as to be insufficient to be a proximate or substantial contributing cause of the alleged injuries.

FOURTEENTH DEFENSE

The claims against NCH are barred because the alleged injuries, if caused by PPA, are the result of plaintiffs' own idiosyncratic or allergic reactions.

FIFTEENTH DEFENSE

Discovery may show that the damages, if any, are limited by the failure to mitigate damages

SIXTEENTH DEFENSE

The claims are barred because the defendant complied with all federal and state statutes as well as all administrative regulations

SEVENTEENTH DEFENSE

The claims are barred because Tavist-D® is comprehensively regulated by the United States Food and Drug Administration pursuant to the Federal Food, Drug & Cosmetic Act, 21 U.S.C §§ 301 et seq., and regulations and orders promulgated thereunder. Accordingly, the claims are preempted by the Supremacy Clause of the United States Constitution, Article VI, clause 2, and the laws of the United States.

EIGHTEENTH DEFENSE

NCH has no legal relationship or privity with plaintiff and owes no duty to plaintiffs by which liability could be attributed to it.

NINETEENTH DEFENSE

The claims, including without limitation the claims for punitive damages, are barred because the use of Tavist-D® was generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

TWENTIETH DEFENSE

NCH hereby gives notice that it intends to rely upon such other defense as may become available or apparent during the course of discovery and thus reserves its right to amend this list to assert such defenses.

NCH DENIES THE ALLEGATIONS IN THE INITIAL PARAGRAPH OF THE PETITION AND SPECIFICALLY RESPONDS TO THE NUMBERED ALLEGATIONS OF THE PETITION, AS FOLLOWS:

1 Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 1 of the *Petition for Damages*

2. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 2 of the *Petition for Damages*, except admits that Novartis Consumer Health, Inc is a Delaware Corporation with its principal place of business in New Jersey and that from January 1, 1997 until in or about November 2000, NCH manufactured, marketed and distributed, promoted and sold Tavist-D® which contained phenylpropanolamine

3 Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 3 of the *Petition for Damages*

4. The allegations in paragraph 4 of the *Petition for Damages* are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is required, NCH denies the allegations in paragraph 4

5 Denies knowledge or information sufficient to form a belief as to the

allegations in paragraph 5 of the *Petition for Damages*, except states upon information and belief, that PPA has been used in the United States in over-the-counter decongestant cough and cold products and appetite suppressants. NCH further states upon information and belief that Tavist-D® contained PPA until or about November 2000.

6 Denies the allegations in paragraph 6 of the *Petition for Damages*, except admits that a report entitled “PPA & Risk of Hemorrhagic Stroke Final Report of the Hemorrhagic Stroke Project” was published on or about May 10, 2000. NCH respectfully refers the Court to the said report for the contents therein. NCH further states that there have been anecdotal reports of strokes in patients who have used a product containing PPA, but that no causal link has been established between the use of PPA and stroke, and respectfully refers the Court to the studies and/or published reports referenced by plaintiff for the contents thereof.

7 Denies the allegations in paragraph 7 of the *Petition for Damages*.

8. Denies the allegations in paragraph 8 of the *Petition for Damages*.

9 Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 9 of the *Petition for Damages*.

10. Denies the allegations in paragraph 10 of the *Petition for Damages*, except denies knowledge or information sufficient to form a belief as to plaintiff's medical history.

11 Denies the allegations in paragraph 11 of the *Petition for Damages*, and further states that there have been anecdotal reports of strokes in patients who have used a product containing PPA, but that no causal link has been established between the use of PPA and stroke.

12 Denies the allegations in paragraph 12 of the *Petition for Damages*, except denies knowledge or information sufficient to form a belief as to plaintiff's medical history

13 Denies the allegations in paragraph 13 of the *Petition for Damages*

14 Denies the allegations in paragraph 14 of the *Petition for Damages*.

15 Denies the allegations in paragraph 15 of the *Petition for Damages*, including subparts therein

16. Denies the allegations in paragraph 16 of the *Petition for Damages*

17 Denies the allegations in paragraph 17 of the *Petition for Damages*, including subparts therein

18 Denies the allegations in paragraph 18 (that is incorrectly numbered as paragraph 15 on page 6) of the *Petition for Damages*.

19 Denies the allegations in paragraph 19 (that is incorrectly numbered as paragraph 16 on page 6) of the *Petition for Damages*

20 The allegations in paragraph 20 (that is incorrectly numbered as paragraph 17 on page 6) and of the *Petition for Damages* are legal conclusions to which no responsive pleading is required To the extent a responsive pleading is required, NCH denies the allegations in paragraph 20 of the *Petition for Damages*

21 NCH denies any allegation in the Petition not expressly admitted herein.

22. NCH requests trial by jury

BY: Eric R. Nowak

Sessions, Fishman & Nathan, L.L.P.

JOY GOLDBERG BRAUN (#3416) T.A.

ERIC R. NOWAK (#27025)

SHIRIN E. HARRELL (#27495)

201 St. Charles Avenue, Suite 3500

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and

Randolph S. Sherman

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Danielle E. Finck

KAYE SCHOLER LLP

425 Park Avenue

New York, New York 10022

Attorneys for Defendant

NOVARTIS PHARMACEUTICALS CORPORATION

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 14th day of August, 2002, served a copy of the foregoing pleading by facsimile and U.S. Mail to plaintiff's counsel, and by U.S. mail, to all other counsel for the parties to this, properly addressed, and first class postage prepaid

Eric R. Nowak

ERIC R. NOWAK



CASE· 2:02-cv-02436/P
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DATE· 08/15/02
CLERK: tbl

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
CLERK

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION; NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ;
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC ; and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION
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* NO 12-2436
*
* SECTION N
*
* MAGISTRATE
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CERTIFICATE OF FILING OF NOTICE OF REMOVAL

The undersigned attorney for defendants, Bayer Corporation, Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc , hereby certify that on the 7th day of AUGUST, 2002, defendants caused to be filed with the Clerk of Court for the Thirty-Fourth Judicial District Court for the Parish of St Bernard in the State of Louisiana, a State Court Proceeding Notice of Removal, a copy of which is attached

Bayer_Donnelly Notice of Removal DOC

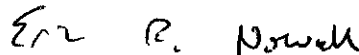
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X Process
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Clerk Dep. J
Doc No. J

Respectfully submitted,



Mary L. Meyer, (La Bar No 19966)
John F. Olinde, (La Bar No 1515)
Charles P. Blanchard, (La Bar No 18798)
**Chaffe, McCall, Phillips,
Toler & Sarpy, L.L.P.**

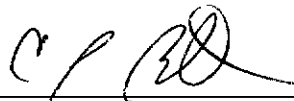
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2300
Telephone. (504) 585-7000
Attorneys for Bayer Corporation



Joy G. Braun (#3416)
Eric R. Nowak (#27025)
Shirin E. Harrell (#27495)
SESSIONS, FISHMAN & NATHAN, L.L.P.
201 St. Charles Avenue, Suite 3500
New Orleans, LA 70170
Telephone (504) 582-1500
**Attorneys for Novartis Pharmaceuticals
Corporation and Novartis Consumer Health,
Inc.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding by mailing a copy of same to each by First Class United States mail, properly addressed and postage prepaid, on this 7th day of August, 2002



34th JUDICIAL DISTRICT COURT

PARISH OF ST. BERNARD

NO. 96-487

DIVISION "C"

DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC., Successor by merger to SHAPERITE;
SMOOTHIE KING CO., INC., SMOOTHIE KING SYSTEMS, INC.; and
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

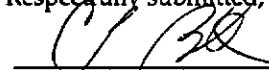
FILED: _____

DEPUTY CLERK

STATE COURT PROCEEDINGS NOTICE OF REMOVAL

Notice is hereby given under 28 U.S.C. §1441, *et seq.*, that defendants, Bayer Corporation, Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc., have filed a "Notice of Removal" of this action in and to the United States District Court for the Eastern District of Louisiana on the 7th day of August, 2002, a copy of which is attached. A copy of that Notice of Removal has been served on all counsel of record. In accordance with the terms of 28 U.S.C. §1446, the State Court shall proceed no further with the action bearing No. 96,487.

Respectfully submitted,



Mary L. Méyer (La. Bar No. 19966)
John F. Olinde (La. Bar No. 1515)
Charles P. Blanchard (La. Bar No. 18798)
CHAFFE, McCALL, PHILLIPS,
TOLER & SARP, L.L.P.
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone No. (504) 585-7000
Attorneys for Bayer Corporation

Eric R. Nowak

Joy G Braun (#3416)
Eric R Nowak (#27025)
Shirin E Harrell (#27495)
SESSIONS, FISHMAN & NATHAN, L.L.P.
201 St Charles Avenue, Suite 3500
New Orleans, LA 70170
Telephone (504) 582-1500
Attorneys for Novartis Pharmaceuticals
Corporation and Novartis Consumer Health,
Inc.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 7th day of August, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid

CPBQ

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION; NOVARTIS
PHARMACEUTICALS CORPORATION;
NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO., INC ; SMOOTHIE KING SYSTEMS,
INC.; and WALGREEN LOUISIANA CO.,
INC. (D/B/A "WALGREENS")

* CIVIL ACTION
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* NO.
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* SECTION
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* MAGISTRATE
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NOTICE OF REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA:

NOW INTO COURT, through undersigned counsel, come Bayer Corporation,
Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc., who
respectfully aver:

1. Bayer Corporation, Novartis Pharmaceuticals Corporation and Novartis
Consumer Health, Inc. are named defendants in a civil suit filed in the Thirty-Fourth
Judicial District Court for the Parish of St. Bernard, State of Louisiana, entitled "*Daphne B.*

Donnelly, and Jerome Donnelly, Husband vs Bayer Corporation; Novartis Pharmaceuticals Corporation; Novartis Consumer Health, Inc.; 4Life Research, LC, Successor by merger to Shaperite; Smoothie King Co., Inc.; Smoothie King Systems, Inc.; and Walgreen Louisiana Co., Inc. (d/b/a "Walgreens") and bearing No. 96-487-C on the docket of that court. Plaintiffs filed their original Petition on July 2, 2002. Copies of the State Court proceedings are attached to this Notice of Removal and constitute all process, pleadings and orders served on the petitioners to date in this suit.

2. This suit is an action in which the Court has original jurisdiction under 28 U.S.C. §1332, as there is complete diversity of citizenship between plaintiffs and the defendants and the matter in controversy exceeds \$75,000 00, exclusive of interest and costs. Thus, this action may be removed to this Court pursuant to the provisions of 28 U.S.C §1441.

3. The forum state is Louisiana. The plaintiffs were, at the time they filed this action, and still are citizens of the State of Louisiana.

4. Bayer Corporation was, at the time the action was filed, and still is a corporation incorporated in the State of Indiana, with its principal place of business in the State of Pennsylvania. Bayer Corporation was not, at the time this action was filed and still is not a citizen of the State of Louisiana.

5. Novartis Pharmaceuticals Corporation was, at the time the action was filed, and still is a corporation incorporated in the State of Delaware, with its principal place of business in the State of New Jersey. Novartis Pharmaceuticals Corporation was not, at the time this action was filed and still is not a citizen of the State of Louisiana.

6 Novartis Consumer Health, Inc. was, at the time the action was filed, and still is a corporation incorporated in the State of Delaware, with its principal place of business in the State of New Jersey. Novartis Consumer Health, Inc. was not, at the time this action was filed and still is not a citizen of the State of Louisiana.

7. Plaintiff has named 4Life Research, LC as a defendant. On information and belief, 4Life Research, LC is a limited liability company organized in the State of Utah, with its principal place of business in Utah. The members of 4Life Research, LC are David Lisonbee and Bianca Lisonbee, both of whom are citizens of the state of Utah. David Lisonbee and Bianca Lisonbee were not at the time this action was filed and still are not citizens of the state of Louisiana.

8. Complete diversity of citizenship exists in this case because the non-diverse defendants, i.e., Smoothie King Co., Inc., Smoothie King Systems, Inc. and Walgreen Louisiana Co., Inc. have been fraudulently joined. *See, e.g., Borden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). When the citizenship of the fraudulently joined party is disregarded, there is complete diversity of citizenship between the plaintiff and the remaining defendants.

9. Plaintiffs fraudulently joined Walgreen Louisiana Co., Inc. They assert claims based on strict liability, negligence, redhibition, fraud, negligent and reckless misrepresentation, and conspiracy to defraud against this defendant. (*See* Original Petition, ¶¶ 17-18). However, they cannot prevail on their claims against Walgreen Louisiana Co., Inc. under Louisiana law. *See, e.g., Perkins v. Bayer Corp., et al*, No. C01-2033R (W.D. Wash. Feb. 26, 2002).

10. Plaintiffs fraudulently joined Smoothie King Co., Inc. and Smoothie King Systems, Inc. Cf. *Perksin v. Bayer Corp., et al*, No. C01-2033R (W.D. Wash. Feb. 26, 2002) Additionally, plaintiff Daphne Donnelly alleges that she suffered a stroke on or about January 12, 1991 allegedly as a result of ingestion of products containing phenylpropanolamine (PPA) and/or ephedrine that she allegedly purchased at a Smoothie King store in Chalmette, Louisiana. Smoothie King did not operate any store in Chalmette on or before January 12, 1991 (see Affidavit of Steve Kuhnuu attached as Exhibit A).

11. It is apparent from the face of plaintiff's Petition that the amount in controversy between the plaintiff and defendants exceeds \$75,000.00, exclusive of interest and costs. See, e.g., *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880 (5th Cir. 2000). Plaintiff Daphne B. Donnelly alleges that she suffered a stroke resulting in paralysis to the right side of her body. (See Petition at ¶ 10). Cf. *Philippe v. Lloyd's Aero Boliviano*, 97-0258 (La. App. 1st Cir. 2/20/98), 710 So.2d 807 (trial court awarded total damages of \$1,168,320.09 for stroke injuries to plaintiff and for loss of consortium to his wife; the Appeals Court later reversed finding no liability); *Smuth v. Cameron Crews, Inc.*, 348 So.2d 179 (La. App. 3d Cir. 1977) (affirming award of \$150,000.00 to plaintiff who suffered stroke as a result of defendant's negligence).

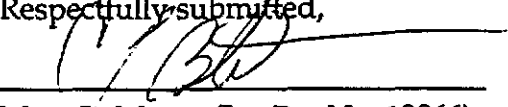
12. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over Jerome Donnelly's loss of consortium claim. See *Booty v. Shoney's, Inc.*, 872 F.Supp 1524 (E.D. La. 1995).

13. 4Life Research consents to this Notice of Removal. See letter attached as Exhibit B.

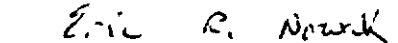
14. Petitioners file this Notice of Removal within 30 days of July 9, 2002, the earliest date of service on any defendant. Petitioners file this Notice of Removal without waiving any objections, exceptions or defenses to plaintiffs' Petition.

15. Petitioners file and present herewith the sum of \$150.00 as required by Title 28, United States Code, § 1446.

Respectfully submitted,


Mary L. Meyer (La. Bar No. 19966)
John F. Olinde (La. Bar No. 1515)
Charles P. Blanchard (La. Bar No. 18798)
**CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY, L.L.P.**

2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone No.: (504) 585-7000
Attorneys for Bayer Corporation


Joy G. Braun (#3416)
Eric R. Nowak (#27025)
Shirin E. Harrell (#27495)
SESSIONS, FISHMAN & NATHAN, L.L.P.
201 St. Charles Avenue, Suite 3500
New Orleans, LA 70170
Telephone: (504) 582-1500
**Attorneys for Novartis Pharmaceuticals
Corporation and Novartis Consumer Health,
Inc.**

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 7th day of August, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.



THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

CITATION

NO: 96-487

DAPHNE B. DONNELLY, AND EROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE;
SMOOTHIE KING CO.; SMOOTHIE KING SYSTEMS, INC.;
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

TO: BAYER CORPORATION
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
CT CORPORATION SYSTEM
8550 UNITED PLAZA BLVD.
BATON ROUGE, LOUISIANA

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for Damages. The Petition tells you what you are being sued for.

You must either DO WHAT THE PETITION ASKS, OR WITHIN FIFTEEN (15) DAYS after you have received these documents, you must file an answer or other legal pleadings in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W. St. Bernard Hwy, Chalmette, LA 70043.

If you do not do what the Petition asks, or if you do not file an answer or legal pleading within FIFTEEN (15) DAYS, a judgment may be entered against you without further notice.

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the 2nd day of July, 2002.

sar P1

LENA R. TORRES
CLERK OF COURT

BY Susan A. Randazzo
Deputy Clerk (S) SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ this Parish in the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with this service I learned by interrogating the same _____ the said _____ being absent from _____ domicile at the time of said service.

Returned Parish of St. Bernard _____, 2002

Sheriff

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ on _____ at _____ this Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to in _____
Returned Parish of St. Bernard _____, 2002

Sheriff

34TH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD

STATE OF LOUISIANA

No. 56 487

DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband
Plaintiff

vs.

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, Successor by merger to SHAPERITE;
SMOOTHIE KING CO., INC.;
SMOOTHIE KING SYSTEMS, INC.; and
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")
Defendants

DIVISION **C**

SECTION _____

FILED

JUL 02 2002

Debra L. Jones
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT comes Petitioner, DAPHINE B. DONNELLY, a person of the full age of majority, and respectfully represents the following:

1. Petitioner, Daphine B. Donnelly, is a person of full age and majority and is a resident and domiciliary of St. Bernard Parish, State of Louisiana.
2. Made pharmaceutical manufacturer defendants herein are:
 - A. Bayer Corporation is an Indiana Corporation with its principal place of business in Pennsylvania, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.
 - B. Novartis Pharmaceuticals Corporation is a Delaware corporation with its principal place of business in New Jersey, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.
 - C. Novartis Consumer Health, Inc. a Delaware corporation with its principal place of business in New Jersey, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.
 - D. 4Life Research, LC, successor in merger to Shaperite, a limited liability company established in Utah 4Life Research, on information and belief, manufactured and distributed

Shapefast®, thus bringing this action against 4Life Research, LC as a manufacturing defendant and as a seller/retailer defendant, regularly selling and advertising in the City of Chalmette, State of Louisiana.

3. Made retailer/seller defendants herein are

A. Smoothie King Co., Inc., a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator.

B. Smoothie King Systems, Inc., a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator

C. Walgreen Louisiana Co., Inc. (D/B/A "Walgreens"), a corporation organized in the State of Louisiana and licensed to and doing business in this state, with its principal place of business in Metairie, Louisiana, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.

4. Defendants are liable jointly and *in solido* unto Petitioner for an amount as is reasonable under the circumstances, for all costs and expert fees of these proceedings, for judicial interest from the date of demand, and for all and equitable relief for the following:

5. Phenylpropanolamine (hereinafter "PPA")/ephedrine was an ingredient used in many over-the-counter and prescription cold medications, it was also used in many over-the-counter weight loss product.

6 Life threatening adverse effects related to PPA/ephedrine leading to hospitalization and/or death have been well documented and known to pharmaceutical companies for decades. These life threatening events have been documented through the Food and Drug Administration (hereinafter referred to as FDA) warning/sentinel events systems, showing a large number of such events related to PPA/ephedrine. Several life threatening PPA/ephedrine injuries have been reported in Clin-Alert and other medical reports. A recent study published by Yale University which concluded that PPA causes hemorrhagic strokes and also found an ingredient "Norephedrine", an active ingredient in PPA, is also found in ephedrine dietary supplements. In addition, PPA/ephedrine is known to cause other serious adverse effects including heart damage and myocardial infarction

7. Defendant manufacturers have concealed material facts, including the serious risks associated with ingesting PPA/ephedrine, from Petitioner in product packaging, labeling, advertising, promotional campaigns and materials, among other ways, regarding the safety and use of products containing PPA/ephedrine.
8. The causal relationship of Petitioner's injury to the products containing PPA/ephedrine were inherently undiscoverable by the Petitioner until she was warned of the dangers by the defendants and/or others. Petitioner did not discover, nor through the exercise of reasonable care and diligence could she have discovered that her injury and illness was in anyway related to products containing PPA/ephedrine until at the earliest when Petitioner was made aware that many PPA containing drugs were withdrawn from the market, and further, that ephedrine contains many of the same ingredients and has been linked to many injuries and deaths relating to its ingestion, just as with PPA-containing products.
9. Petitioner purchased and/or ingested PPA/ephedrine containing product within all times relevant times, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®. Petitioner purchased Shapefast® at Smoothie King a nutritional/retail store located in the City of Chalmette, State of Louisiana. Petitioner purchased Alka Seltzer Plus® and Tavist-D® at Walgreens, a pharmaceutical/retail store located in the City of Chalmette, State of Louisiana.
10. Petitioner herein has suffered and still suffers serious and grievous injuries as a result of ingesting PPA/ephedrine containing products. On or about January 12, 1991, suffered from a stroke in Chalmette, Louisiana and was taken to Pendleton Methodist Memorial Hospital in New Orleans, Louisiana. Petitioner suffered from, including, but not limited to, paralysis to the right side of her body.
11. Petitioner avers that the sole and proximate cause of Petitioner's injury was her consumption of the above-referenced PPA/ephedrine-containing products, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®, and that she did not become aware of the causal link between the consumption of PPA/ephedrine-containing products and these health risks and injuries until recently.
12. As a direct and consequential result of the foregoing, Petitioner has sustained physical and mental pain and suffering, loss of income, loss of consortium, loss of enjoyment of life, and

other damages to be shown at trial. All of the foregoing damages are past, present and future

13. Petitioner, Jerome Donnelly, husband of Daphne Donnelly, has suffered, sustained, and incurred injuries as a result of his spouse's debilitating and impaired condition. Petitioner has suffered loss of consortium in the past and will sustain, in reasonable medical probability, a loss of consortium claim in the future.
14. The incident and any resultant damages occurred through no fault or negligence on the part of the Petitioner.
15. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault of the pharmaceutical manufacturer defendants, as manufacturers of the product which contained PPA/ephedrine, in the following non-exclusive particulars.
 - 1) Pharmaceutical manufacturer defendants are liable under the Louisiana Products Liability Act, Louisiana Revised Statutes Annotated 9:2800.51 *et. seq.*
 - a.) Pharmaceutical manufacturer defendants manufactured products which were unreasonably dangerous in design at the time the product left the manufacturers' control and such defects in design were the proximate cause of damages suffered by Petitioner. The products were ingested and taken as intended.
 - b.) Pharmaceutical manufacturer defendants failed to employ alternative designs which would have reduced, if not prevented Petitioner's damages, and their failure to employ alternative designs was a proximate cause of the damages suffered by Petitioner.
 - c.) Pharmaceutical manufacturer defendants failed to adopt alternative designs for their products and they knew of the likelihood that its products' design would cause Petitioner's injuries; and defendants knew the gravity of the potential injuries outweighed the utility of their products.
 - d.) Petitioner specifically alleges that an alternative design of pharmaceutical manufacturer defendants' products would have nullified, or substantially reduced the injuries Petitioner suffered.
 - e.) Pharmaceutical manufacturer defendants failed to post suitable and adequate warning(s) or instruction(s) concerning the risks of their products, including,

but not limited to, adequately warning potential users of the medication's known adverse side-effects, including heart problems and strokes, and any and all other side-effects suffered by Petitioner

- f) Pharmaceutical manufacturer defendants failed to alert users, potential users, and retail dealers who would be expected to sell and/or recommend its products, of the hazards associated with said products' usage, and further actively promoted and advertised their products in a manner that suggested the design of their products was safe.

16. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability of pharmaceutical manufacturer defendants by their failure to exercise reasonable care in the manufacture of its products when they knew or should have known that Petitioner was a foreseeable and intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed to protect intended users of their products.

17. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault of defendants, as sellers and/or retailers of the product which contained PPA/ephedrine, rendering retailer/seller defendants liable for any and all damages suffered by Petitioner, including attorney fees, in the following non-exclusive particulars:

- 1.) Retailer/seller defendants are liable for breach of the warranty against redhibitory defects, or vices, in the subject over-the-counter medications, existing at the time of the sale to Petitioner, pursuant to La. Civ. Code Article 2520 *et. seq.*
 - a.) Retailer/seller defendants failed to give Petitioner notice of the dangerous side-effects of the subject over-the-counter medications they sold to Petitioner which contained PPA/ephedrine; and retailer/seller defendants had actual knowledge of the existence of said redhibitory defects at the time of the sale.
- 2.) Retailer/seller defendants are liable under La. Civ. Code Article 2524 for failure to sell a product fit for its ordinary usage.
 - a.) Retailer/seller defendants knew Petitioner's intended usage of the subject over-the-counter medications and knew of Petitioner's reliance on the skill and

judgment of retailer/seller defendants in the sale of the over-the-counter medications. Retailer/seller defendants failed to exercise the appropriate skill of judgment in the sale of their products to Petitioner.

3) Retailer/seller defendants are liable under La. Civ. Code Article 2529 for delivering products not of the kind or quality specified by the seller.

a.) Retailer/seller defendants sold over-the-counter medications to Petitioner which were misrepresented by retailer/seller defendants as being safe for human consumption. Retailer/seller defendant failed to adequately inform Petitioner of the dangers inherent in the over-the-counter medications they sold to Petitioner.

15. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability retailer/seller defendants by their failure to exercise reasonable care in the sale and/or retail of its products when it knew, or should have known, that Petitioner was a buyer and a foreseeable intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed by retailer/seller defendants to protect intended buyers and users of the subject products.


16. Pharmaceutical manufacturer defendants and retailer/seller defendants are liable *in solido* for intentional and willful conspiracy pursuant to La. Civ. Code Article 2324. Defendants, among themselves, conspired with one another to conceal material facts including the hazardous nature of the subject product they manufactured and sold to the public in general and Petitioner. Defendants knew that the injuries suffered by Petitioner were substantially certain to occur through the consumption and ingestion of the over-the-counter medication they manufactured and sold.

17. Venue for this action arises under Louisiana Code of Civ. Pro. Articles 42 *et seq.*, as the wrongful conduct of defendants complained of herein occurred in the Parish of St. Bernard. Petitioner purchased and suffered her injuries in St. Bernard Parish, State of Louisiana.

WHEREFORE, Petitioner prays that after due proceedings be had there be a judgment rendered herein in favor of Petitioner and against defendants jointly, severally, and *in solido*, for such damages as are reasonable in the premises, together with the maximum legal interest from the date of judicial demand, until paid, for all costs of these proceedings,

and for all other general and equitable relief to which Petitioner may be awarded Petitioner respectfully requests a TRIAL BY JURY.

Respectfully submitted,


J. Chandler Loupe
CLAYTOR & LOUPR, LLC
STATE BAR NO. 19955
2223 Quail Run Drive, Ste. G
Baton Rouge, LA 70808
(225) 767-2222 (Telephone)
(225) 767-9003 (Facsimile)

KIRK LAW FIRM
Dana Kirk
MS STATE BAR NO. 100188
TX STATE BAR NO. 11057500
4265 San Felipe Street, Ste. 1400
Houston, TX 77027
(713) 651-0050

CLARK, DEPEW & TRACEY, LTD., L.L.P.
Clayton Clark
TX STATE BAR NO. 04275750
440 Louisiana Street, Ste. 1600
Houston, TX 77002
(713) 757-1400

J. ROBERT DAVIS LAW FIRM
J. Robert Davis
TX STATE BAR NO. 00788859
440 Louisiana Street, Ste. 1600
Houston, TX 77002
(713) 425-5255

PLEASE SERVE:

BAYER CORPORATION
By and Through its Registered Agent for Service of Process:
CT Corporation System
8550 United Plaza Blvd.
Baton Rouge, LA 70809

NOVARTIS PHARMACEUTICAL CORPORATION
By and Through its Registered Agent for Service of Process:
320 Somerulos Street
Baton Rouge, LA 70802

NOVARTIS CONSUMER HEALTH, INC.
By and Through its Registered Agent for Service of Process:
Corporation Service Company
2711 Centerville Road, Ste. 400
Wilmington, DE 19808

A TRUE COPY

Lena R. Torres
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

By 
DEPUTY CLERK
/s/ SUSAN A. RANDAZZO

4LIFE RESEARCH, LC

By and Through its Registered Agent for Service of Process.

David Lisonbee

9850 S. 300 W

Sandy, UT 840703262

SMOOTHIE KING CO , INC.

By and Through its Registered Agent for Service of Process:

Stephen Kuhnau, Sr

2400 Veterans Blvd , Ste 110

Kenner, LA 70062

SMOOTHIE KING SYSTEMS, INC.

By and Through its Registered Agent for Service of Process:

Stephen Kuhnau, Sr.

2400 Veterans Blvd., Ste. 110

Kenner, LA 70062

WALGREEN LOUISIANA CO., INC.

By and Through its Registered Agent for Service of Process:

The Prentice-Hall Corporation System, Inc.

701 South Peters Street, Second Floor

New Orleans, LA 70130

AFFIDAVIT OF STEVE KUHNAU

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state set forth above, personally came and appeared:

STEVE KUHNAU

who, after being duly sworn, deposed and stated the following:

1.

I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, could and would competently testify to the following.

2

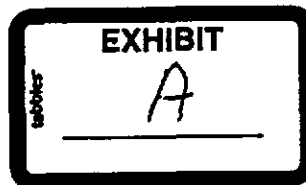
The Smoothie King store located at 3366 Paris Road, Chalmette, Louisiana is the only store operated in Chalmette, Louisiana and there has been no other store operating in that geographic location in the history of the Smoothie King franchising business.

3.

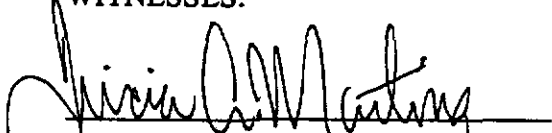
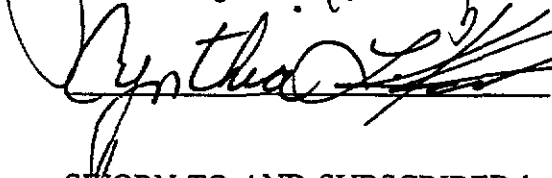
The Franchise Agreement #20 which authorizes this Chalmette, Louisiana location was executed by franchisees on October 9, 1991.

4.

This Smoothie King store opened on February 17, 1992 at the location of 3366 Paris Road, Chalmette, Louisiana



WITNESSES:


STEVE KUHAU
Chairman, Board of Directors

SWORN TO AND SUBSCRIBED before me, this 26 day of July, 2002, in New Orleans,
Louisiana.


Notary Public

CLAITOR & LOUPE, L.L.C.

ATTORNEYS AND COUNSELORS AT LAW
2223 Quail Run Drive, Suite G, Baton Rouge, Louisiana 70808
Tel. (225) 767-2222 • Fax: (225) 767-9003

July 24, 2002

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO.: 7002 0460 0001 9147 0243

Novartis Consumer Health, Inc.
By and Through its Registered Agent for Service of Process:
Corporation Service Company
2711 Centerville Road, Suite 400
Wilmington, DE 19808

RE: *Daphine B. Donnelly, and Jerome Donnelly, Husband vs. Bayer Corporation, et al*
34th JDC, St. Bernard Parish, Docket No.96,487, Division "C"

Sir/Madam:

We represent Daphine B. Donnelly, and Jerome Donnelly, husband, in claims arising out of incidents, wherein our clients ingested a product containing PPA.

We have filed the above numbered and captioned suit on behalf of Daphine B. Donnelly, and Jerome Donnelly, husband, for damages resulting from this incident. Since you are a non-resident of Louisiana, we are obtaining service of process on you pursuant to LSA R.S. 13:3201 et seq. In order to comply with the requirements of law, we give you herewith notice of such service, together with a certified copy of the Petition and Citation which is being sent by the plaintiffs, via certified mail.

Please forward this matter to your attorney for immediate handling.

Sincerely,

CLAITOR, LOUPE & BATEMAN, L.L.C.


J. Chandler Loupe

JCL:seb
Attachments

THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

CITATION

NO: 96-487

DAPHINE B. DONNELLY, AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE;
SMOOTHIE KING CO.; SMOOTHIE KING SYSTEMS, INC.;
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

TO. NOVARTIS CONSUMER HEALTH, INC.
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
CORPORATION SERVICE COMPANY
2711 CENTERVILLE ROAD, SUITE 400
WILMINGTON, DE 19808

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for Damages. The Petition tells you what you are being sued for.

You must either DO WHAT THE PETITION ASKS, OR WITHIN THIRTY (30) DAYS after you have received these documents, you must file an answer or other legal pleadings in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W. St. Bernard Hwy, Chalmette, LA 70043.

If you do not do what the Petition asks, or if you do not file an answer or legal pleading within THIRTY (30) DAYS, a judgment may be entered against you without further notice.

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the 2nd day of July, 2002.

sar PI

LENA R. TORRES
CLERK OF COURT

BY Susan A. Randazzo
Deputy Clerk/S/ SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ this Parish in the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with this service I learned by interrogating the same _____ the said _____ being absent from _____ domicile at the time of said service.

Returned Parish of St. Bernard _____, 2002

Sheriff

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ on _____ at _____ this Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to in _____ Returned Parish of St. Bernard _____, 2002

Sheriff

THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA



C

CITATION

NO 96-487

DAPHNE B. DONNELLY, AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION, NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
ALIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE;
SMOOTHIE KING CO.; SMOOTHIE KING SYSTEMS, INC.;
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

TO: NOVARTIS PHARMACEUTICAL CORPORATION
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
320 SOMERULOS STREET
BATON ROUGE, LOUISIANA

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sr P1

LENA R. TORRES
CLERK OF COURT

BY Susan A. Randazzo
Deputy Clerk/S/ SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ that Parish is the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with this service I learned by interrogating the same _____ at the time of said service _____

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ at _____ Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to in _____ Parish of St. Bernard _____, 2002

Sheriff





9850 South 300 West • Sandy, UT 84070 • (801) 562-3600 • (801) 562-3611 Fax

July 31, 2002

VIA FACSIMILE ONLY
(504) 585-7075

Charles Blanchard
CHAFFE, MCCALL, PHILLIPS, TOLER & SARPY
2300 Energy Centre, 1100 Poydras St
New Orleans, LA 70163

Re. Donnelly, et. al. v. Bayer Corporation, et al
34th JDC, St Bernard Parish
Docket No. 96,487, Division "C"
Consent to Notice of Removal

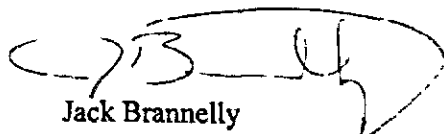
Dear Charles:

I am corporate counsel for 4Life Research, LC, one of the named defendants in the above action. I am responsible for managing all litigation for 4Life worldwide.

4Life is incorporated in Utah, and has its principal place of business in Sandy, Utah

You have indicated that Bayer and other defendants plan to file a Notice of Removal in the U.S. District Court for the Eastern District of Louisiana, and that all defendants who have been properly served in the action must agree to such removal. 4Life was served with the complaint in the above action on July 29, 2002, and hereby consents to the notice of removal, but reserves all defenses, objections, and claims.

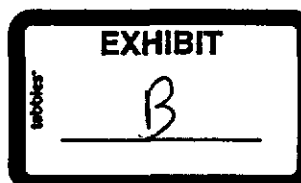
Very truly yours,


Jack Brannelly
Vice President of Legal Affairs
4Life Research, LC

JJB/

cc. Steve Tew, CFO, COO
File

4Life Research, LC





CASE 2:02-cv-02436/P
DOCUMENT: 2
DATE 08/09/02
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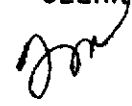
*** There will be no noticing for this document.***

Document scanned by: 3 (signature)

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U.S. DISTRICT COURT -
EASTERN DISTRICT OF LA

2002 AUG -7 AM 11:52

LORETTA G. WHYTE
CLERK



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAPHINE B DONNELLY, and
JEROME DONNELLY, Husband

VERSUS

BAYER CORPORATION, NOVARTIS
PHARMACEUTICALS CORPORATION,
NOVARTIS CONSUMER HEALTH, INC ;
4LIFE RESEARCH, LC, Successor by
merger to SHAPERITE, SMOOTHIE KING
CO , INC , SMOOTHIE KING SYSTEMS,
INC , and WALGREEN LOUISIANA CO ,
INC (D/B/A "WALGREENS")

* CIVIL ACTION

* NO **02-2436**

* SECTION

* **SECT N MAG. 1**

* MAGISTRATE

*

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NOTICE OF REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA:

NOW INTO COURT, through undersigned counsel, come Bayer Corporation,
Novartis Pharmaceuticals Corporation and Novartis Consumer Health, Inc , who
respectfully aver

1 Bayer Corporation, Novartis Pharmaceuticals Corporation and Novartis
Consumer Health, Inc are named defendants in a civil suit filed in the Thirty-Fourth
Judicial District Court for the Parish of St Bernard, State of Louisiana, entitled "Daphne B

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|-----------|------|
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| Process | |
| Exec | 1765 |
| Clk and p | |
| Doc No | 1 |

Donnelly, and Jerome Donnelly, Husband vs Bayer Corporation, Novartis Pharmaceuticals Corporation, Novartis Consumer Health, Inc, 4Life Research, LC, Successor by merger to Shaperite, Smoothie King Co, Inc; Smoothie King Systems, Inc; and Walgreen Louisiana Co., Inc (d/b/a "Walgreens") and bearing No 96-487-C on the docket of that court. Plaintiffs filed their original Petition on July 2, 2002. Copies of the State Court proceedings are attached to this Notice of Removal and constitute all process, pleadings and orders served on the petitioners to date in this suit.

2 This suit is an action in which the Court has original jurisdiction under 28 USC §1332, as there is complete diversity of citizenship between plaintiffs and the defendants and the matter in controversy exceeds \$75,000.00, exclusive of interest and costs. Thus, this action may be removed to this Court pursuant to the provisions of 28 USC §1441.

3 The forum state is Louisiana. The plaintiffs were, at the time they filed this action, and still are citizens of the State of Louisiana.

4 Bayer Corporation was, at the time the action was filed, and still is a corporation incorporated in the State of Indiana, with its principal place of business in the State of Pennsylvania. Bayer Corporation was not, at the time this action was filed and still is not a citizen of the State of Louisiana.

5 Novartis Pharmaceuticals Corporation was, at the time the action was filed, and still is a corporation incorporated in the State of Delaware, with its principal place of business in the State of New Jersey. Novartis Pharmaceuticals Corporation was not, at the time this action was filed and still is not a citizen of the State of Louisiana.

6 Novartis Consumer Health, Inc was, at the time the action was filed, and still is a corporation incorporated in the State of Delaware, with its principal place of business in the State of New Jersey Novartis Consumer Health, Inc was not, at the time this action was filed and still is not a citizen of the State of Louisiana

7 Plaintiff has named 4Life Research, LC as a defendant. On information and belief, 4Life Research, LC is a limited liability company organized in the State of Utah, with its principal place of business in Utah The members of 4Life Research, LC are David Lisonbee and Bianca Lisonbee, both of whom are citizens of the state of Utah David Lisonbee and Bianca Lisonbee were not at the time this action was filed and still are not citizens of the state of Louisiana

8 Complete diversity of citizenship exists in this case because the non-diverse defendants, i.e., Smoothie King Co, Inc, Smoothie King Systems, Inc. and Walgreen Louisiana Co, Inc have been fraudulently joined See, e.g., *Borden v General Dynamics Corp*, 60 F 3d 213, 217 (5th Cir 1995) When the citizenship of the fraudulently joined party is disregarded, there is complete diversity of citizenship between the plaintiff and the remaining defendants

9 Plaintiffs fraudulently joined Walgreen Louisiana Co, Inc They assert claims based on strict liability, negligence, redhibition, fraud, negligent and reckless misrepresentation, and conspiracy to defraud against this defendant. (See Original Petition, ¶¶ 17-18) However, they cannot prevail on their claims against Walgreen Louisiana Co, Inc. under Louisiana law See, e.g., *Perksin v. Bayer Corp., et al*, No C01-2033R (W D Wash Feb 26, 2002).

10 Plaintiffs fraudulently joined Smoothie King Co , Inc and Smoothie King Systems, Inc *Cf Perksin v Bayer Corp , et al*, No C01-2033R (W D Wash Feb 26, 2002) Additionally, plaintiff Daphne Donnelly alleges that she suffered a stroke on or about January 12, 1991 allegedly as a result of ingestion of products containing phenylpropanolamine (PPA) and/or ephedrine that she allegedly purchased at a Smoothie King store in Chalmette, Louisiana Smoothie King did not operate any store in Chalmette on or before January 12, 1991 (*see* Affidavit of Steve Kuhnau attached as Exhibit A)

11 It is apparent from the face of plaintiff's Petition that the amount in controversy between the plaintiff and defendants exceeds \$75,000 00, exclusive of interest and costs *See, e.g , Gebbia v Wal-Mart Stores, Inc , 233 F 3d 880 (5th Cir 2000)* Plaintiff Daphne B Donnelly alleges that she suffered a stroke resulting in paralysis to the right side of her body (*See* Petition at ¶ 10) *Cf Philippe v Lloyd's Aero Boliviano, 97-0258 (La App 1st Cir 2/20/98), 710 So 2d 807* (trial court awarded total damages of \$1,168,320 09 for stroke injuries to plaintiff and for loss of consortium to his wife, the Appeals Court later reversed finding no liability), *Smith v Cameron Crews, Inc , 348 So 2d 179 (La App 3d Cir 1977)* (affirming award of \$150,000 00 to plaintiff who suffered stroke as a result of defendant's negligence)

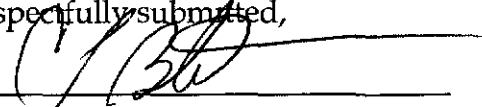
12 This Court has supplemental jurisdiction under 28 USC § 1367 over Jerome Donnelly's loss of consortium claim *See Booty v. Shoney's, Inc , 872 F Supp 1524 (E D La 1995)*

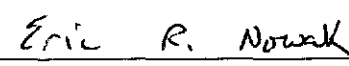
13. 4Life Research consents to this Notice of Removal. See letter attached as Exhibit B

14 Petitioners file this Notice of Removal within 30 days of July 9, 2002, the earliest date of service on any defendant Petitioners file this Notice of Removal without waiving any objections, exceptions or defenses to plaintiffs' Petition

15 Petitioners file and present herewith the sum of \$150 00 as required by Title 28, United States Code, § 1446

Respectfully submitted,


Mary L. Meyer (La. Bar No. 19966)
John F. Olinde (La. Bar No. 1515)
Charles P. Blanchard (La. Bar No. 18798)
**CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY, L.L.P.**
2300 Energy Centre, 1100 Poydras Street
New Orleans, LA 70163-2300
Telephone No (504) 585-7000
Attorneys for Bayer Corporation


Joy G. Braun (#3416)
Eric R. Nowak (#27025)
Shirin E. Harrell (#27495)
SESSIONS, FISHMAN & NATHAN, L.L.P.
201 St. Charles Avenue, Suite 3500
New Orleans, LA 70170
Telephone (504) 582-1500
**Attorneys for Novartis Pharmaceuticals
Corporation and Novartis Consumer Health,
Inc.**

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 7th day of AUGUST, 2002, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid



THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

CITATION

NO- 96-487

DAPHINE B. DONNELLY, AND, EROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION, NOVARTIS CONSUMER HEALTH, INC. ;
4LIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE;
SMOOTHIE KING CO., SMOOTHIE KING SYSTEMS, INC. ;
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")

TO: BAYER CORPORATION
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
CT CORPORATION SYSTEM
8550 UNITED PLAZA BLVD.
BATON ROUGE, LOUISIANA

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for
Damages. The Petition tells you what you are being sued for

You must either DO WHAT THE PETITION ASKS, OR WITHIN FIFTEEN (15)
DAYS after you have received these documents, you must file an answer or other legal pleadings
in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W. St. Bernard
Hwy, Chalmette, LA 70043.

If you do not do what the Petition asks, or if you do not file an answer or legal pleading
within FIFTEEN (15) DAYS, a judgment may be entered against you without further notice.

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the
2nd day of July, 2002.

sar P1

LENA R. TORRES
CLERK OF COURT

BY *Susan A. Randazzo*
Deputy Clerk /S/ SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ this Parish in the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with this service I learned by interrogating the same _____ the said _____ being absent from _____ domicile at the time of said service.

Returned Parish of St. Bernard _____, 2002

Sheriff

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ on _____ at _____ this Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to in _____ Returned Parish of St. Bernard _____, 2002

Sheriff

34TH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD

STATE OF LOUISIANA

No. 56 487

**DAPHINE B. DONNELLY, and
JEROME DONNELLY, Husband**
Plaintiff

vs.

**BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.;
4LIFE RESEARCH, LC, Successor by merger to SHAPERITE;
SMOOTHIE KING CO., INC.;
SMOOTHIE KING SYSTEMS, INC.; and
WALGREEN LOUISIANA CO., INC. (D/B/A "WALGREENS")**
Defendants

DIVISION **C**

SECTION _____

FILED

JUL 02 2002

10:10 AM

Debra R. Jones
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT comes Petitioner, **DAPHINE B. DONNELLY**, a person of the full age of majority, and respectfully represents the following:

1. Petitioner, Daphine B Donnelly, is a person of full age and majority and is a resident and domiciliary of St Bernard Parish, State of Louisiana.
2. Made pharmaceutical manufacturer defendants herein are:
 - A Bayer Corporation is an Indiana Corporation with its principal place of business in Pennsylvania, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.
 - B Novartis Pharmaceuticals Corporation is a Delaware corporation with its principal place of business in New Jersey, regularly selling and advertising it product in the City of Chalmette, State of Louisiana
 - C Novartis Consumer Health, Inc a Delaware corporation with its principal place of business in New Jersey, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.
 - D 4Life Research, LC, successor in merger to Shaperite, a limited liability company established in Utah 4Life Research, on information and belief, manufactured and distributed

Shapefast®, thus bringing this action against 4Life Research, LC as a manufacturing defendant and as a seller/retailer defendant, regularly selling and advertising in the City of Chalmette, State of Louisiana

3 Made retailer/seller defendants herein are

A Smoothie King Co , Inc , a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator.

B. Smoothie King Systems, Inc., a Louisiana corporation with its principal place of business in Kenner, Louisiana, on information and belief, regularly selling and advertising its product in the St. Bernard Parish, State of Louisiana, through a franchise operator.

C. Walgreen Louisiana Co , Inc (D/B/A "Walgreens"), a corporation organized in the State of Louisiana and licensed to and doing business in this state, with its principal place of business in Metairie, Louisiana, regularly selling and advertising its product in the City of Chalmette, State of Louisiana.

4. Defendants are liable jointly and *in solido* unto Petitioner for an amount as is reasonable under the circumstances, for all costs and expert fees of these proceedings, for judicial interest from the date of demand, and for all and equitable relief for the following:

5 Phenylpropanolamine (hereinafter "PPA")/ephedrine was an ingredient used in many over-the-counter and prescription cold medications; it was also used in many over-the-counter weight loss product.

6 Life threatening adverse effects related to PPA/ephedrine leading to hospitalization and/or death have been well documented and known to pharmaceutical companies for decades. These life threatening events have been documented through the Food and Drug Administration (hereinafter referred to as FDA) warning/sentinel events systems, showing a large number of such events related to PPA/ephedrine. Several life threatening PPA/ephedrine injuries have been reported in Clin-Alert and other medical reports. A recent study published by Yale University which concluded that PPA causes hemorrhagic strokes and also found an ingredient "Norephedrine", an active ingredient in PPA, is also found in ephedrine dietary supplements. In addition, PPA/ephedrine is known to cause other serious adverse effects including heart damage and myocardial infarction.

Defendant manufacturers have concealed material facts, including the serious risks associated with ingesting PPA/ephedrine, from Petitioner in product packaging, labeling, advertising, promotional campaigns and materials, among other ways, regarding the safety and use of products containing PPA/ephedrine

- 8 The causal relationship of Petitioner's injury to the products containing PPA/ephedrine were inherently undiscoverable by the Petitioner until she was warned of the dangers by the defendants and/or others. Petitioner did not discover, nor through the exercise of reasonable care and diligence could she have discovered that her injury and illness was in anyway related to products containing PPA/ephedrine until at the earliest when Petitioner was made aware that many PPA containing drugs were withdrawn from the market, and further, that ephedrine contains many of the same ingredients and has been linked to many injuries and deaths relating to its ingestion, just as with PPA-containing products.
9. Petitioner purchased and/or ingested PPA/ephedrine containing product within all times relevant times, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®. Petitioner purchased Shapefast® at Smoothie King a nutritional/retail store located in the City of Chalmette, State of Louisiana. Petitioner purchased Alka Seltzer Plus® and Tavist-D® at Walgreens, a pharmaceutical/retail store located in the City of Chalmette, State of Louisiana
- 10 Petitioner herein has suffered and still suffers serious and grievous injuries as a result of ingesting PPA/ephedrine containing products. On or about January 12, 1991, suffered from a stroke in Chalmette, Louisiana and was taken to Pendleton Methodist Memorial Hospital in New Orleans, Louisiana. Petitioner suffered from, including, but not limited to, paralysis to the right side of her body
- 11 Petitioner avers that the sole and proximate cause of Petitioner's injury was her consumption of the above-referenced PPA/ephedrine-containing products, including, but not limited to, Shapefast®, Alka Seltzer Plus®, and Tavist-D®, and that she did not become aware of the causal link between the consumption of PPA/ephedrine-containing products and these health risks and injuries until recently
12. As a direct and consequential result of the foregoing, Petitioner has sustained physical and mental pain and suffering, loss of income, loss of consortium, loss of enjoyment of life, and

other damages to be shown at trial. All of the foregoing damages are past, present and future

13 Petitioner, Jerome Donnelly, husband of Daphne Donnelly, has suffered, sustained, and incurred injuries as a result of his spouse's debilitating and impaired condition. Petitioner has suffered loss of consortium in the past and will sustain, in reasonable medical probability, a loss of consortium claim in the future.

14. The incident and any resultant damages occurred through no fault or negligence on the part of the Petitioner.

15. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault of the pharmaceutical manufacturer defendants, as manufacturers of the product which contained PPA/ephedrine, in the following non-exclusive particulars.

1) **Pharmaceutical manufacturer defendants are liable under the Louisiana Products Liability Act, Louisiana Revised Statutes Annotated 9.2800.51 *et seq.***

a.) **Pharmaceutical manufacturer defendants manufactured products which were unreasonably dangerous in design at the time the product left the manufacturers' control and such defects in design were the proximate cause of damages suffered by Petitioner. The products were ingested and taken as intended.**

b.) **Pharmaceutical manufacturer defendants failed to employ alternative designs which would have reduced, if not prevented Petitioner's damages, and their failure to employ alternative designs was a proximate cause of the damages suffered by Petitioner.**

c.) **Pharmaceutical manufacturer defendants failed to adopt alternative designs for their products and they knew of the likelihood that its products' design would cause Petitioner's injuries; and defendants knew the gravity of the potential injuries outweighed the utility of their products.**

d.) **Petitioner specifically alleges that an alternative design of pharmaceutical manufacturer defendants' products would have nullified, or substantially reduced the injuries Petitioner suffered.**

e.) **Pharmaceutical manufacturer defendants failed to post suitable and adequate warning(s) or instruction(s) concerning the risks of their products, including,**

but not limited to, adequately warning potential users of the medication's known adverse side-effects, including heart problems and strokes, and any and all other side-effects suffered by Petitioner

- f) Pharmaceutical manufacturer defendants failed to alert users, potential users, and retail dealers who would be expected to sell and/or recommend its products, of the hazards associated with said products' usage, and further actively promoted and advertised their products in a manner that suggested the design of their products was safe

16 The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability of pharmaceutical manufacturer defendants by their failure to exercise reasonable care in the manufacture of its products when they knew or should have known that Petitioner was a foreseeable and intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed to protect intended users of their products.

17. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault of defendants, as sellers and/or retailers of the product which contained PPA/ephedrine, rendering retailer/seller defendants liable for any and all damages suffered by Petitioner, including attorney fees, in the following non-exclusive particulars

- 1) Retailer/seller defendants are liable for breach of the warranty against redhibitory defects, or vices, in the subject over-the-counter medications, existing at the time of the sale to Petitioner, pursuant to La. Civ. Code Article 2520 *et seq.*

- a) Retailer/seller defendants failed to give Petitioner notice of the dangerous side-effects of the subject over-the-counter medications they sold to Petitioner which contained PPA/ephedrine; and retailer/seller defendants had actual knowledge of the existence of said redhibitory defects at the time of the sale.

- 2) Retailer/seller defendants are liable under La. Civ. Code Article 2524 for failure to sell a product fit for its ordinary usage

- a.) Retailer/seller defendants knew Petitioner's intended usage of the subject over-the-counter medications and knew of Petitioner's reliance on the skill and

judgment of retailer/seller defendants in the sale of their over-the-counter medications. Retailer/seller defendants failed to exercise the appropriate skill of judgment in the sale of their products to Petitioner.

3) Retailer/seller defendants are liable under La. Civ. Code Article 2529 for delivering products not of the kind or quality specified by the seller.

a.) Retailer/seller defendants sold over-the-counter medications to Petitioner which were misrepresented by retailer/seller defendants as being safe for human consumption. Retailer/seller defendant failed to adequately inform Petitioner of the dangers inherent in the over-the-counter medications they sold to Petitioner.

15. The incident and any and all resultant injuries and damages to Petitioner occurred through the fault, negligence, want of care, gross negligence, and/or strict liability retailer/seller defendants by their failure to exercise reasonable care in the sale and/or retail of its products when it knew, or should have known, that Petitioner was a buyer and a foreseeable intended user of their products, and the risk of harm suffered by Petitioner was encompassed within the duty owed by retailer/seller defendants to protect intended buyers and users of the subject products.

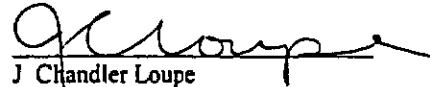
16. Pharmaceutical manufacturer defendants and retailer/seller defendants are liable *in solido* for intentional and willful conspiracy pursuant to La. Civ. Code Article 2324. Defendants, among themselves, conspired with one another to conceal material facts including the hazardous nature of the subject product they manufactured and sold to the public in general and Petitioner. Defendants knew that the injuries suffered by Petitioner were substantially certain to occur through the consumption and ingestion of the over-the-counter medication they manufactured and sold.

17. Venue for this action arises under Louisiana Code of Civ. Pro. Articles 42 *et seq.*, as the wrongful conduct of defendants complained of herein occurred in the Parish of St. Bernard. Petitioner purchased and suffered her injuries in St. Bernard Parish, State of Louisiana.

WHEREFORE, Petitioner prays that after due proceedings be had there be a judgment rendered herein in favor of Petitioner and against defendants jointly, severally, and *in solido*, for such damages as are reasonable in the premises, together with the maximum legal interest from the date of judicial demand, until paid, for all costs of these proceedings,

and for all other general and equitable relief to which Petitioner may be awarded Petitioner respectfully requests a TRIAL BY JURY

Respectfully submitted,



J Chandler Loupe
CLAITOR & LOUPR, LLC
STATE BAR NO. 19955
2223 Quail Run Drive, Ste G
Baton Rouge, LA 70808
(225) 767-2222 (Telephone)
(225) 767-9003 (Facsimile)

KIRK LAW FIRM

Dana Kirk
MS STATE BAR NO. 100188
TX STATE BAR NO 11057500
4265 San Felipe Street, Ste. 1400
Houston, TX 77027
(713) 651-0050

CLARK, DEPEW & TRACEY, LTD., L.L.P.

Clayton Clark
TX STATE BAR NO. 04275750
440 Louisiana Street, Ste. 1600
Houston, TX 77002
(713) 757-1400

J. ROBERT DAVIS LAW FIRM

J Robert Davis
TX STATE BA NO. 00788859
440 Louisiana Street, Ste 1600
Houston, TX 77002
(713) 425-5255

PLEASE SERVE:

BAYER CORPORATION

By and Through its Registered Agent for Service of Process
CT Corporation System
8550 United Plaza Blvd.
Baton Rouge, LA 70809

NOVARTIS PHARMACEUTICAL CORPORATION

By and Through its Registered Agent for Service of Process.
320 Somerulos Street
Baton Rouge, LA 70802

NOVARTIS CONSUMER HEALTH, INC

By and Through its Registered Agent for Service of Process.
Corporation Service Company
2711 Centerville Road, Ste 400
Wilmington, DE 19808

A TRUE COPY

Lena R. Torres

CLERK OF COURT
PARISH OF ST BERNARD
STATE OF LOUISIANA

By 
DEPUTY CLERK

/S/ SUSAN A. RANDAZZO

4LIFE RESEARCH, LC
By and Through its Registered Agent for Service of Process
David Lisonbee
9850 S 300 W
Sandy, UT 840703262

SMOOTHIE KING CO , INC
By and Through its Registered Agent for Service of Process
Stephen Kuhnau, Sr
2400 Veterans Blvd , Ste 110
Kenner, LA 70062

SMOOTHIE KING SYSTEMS, INC
By and Through its Registered Agent for Service of Process:
Stephen Kuhnau, Sr.
2400 Veterans Blvd , Ste. 110
Kenner, LA 70062

WALGREEN LOUISIANA CO , INC
By and Through its Registered Agent for Service of Process.
The Prentice-Hall Corporation System, Inc.
701 South Peters Street, Second Floor
New Orleans, LA 70130

CLAITOR & LOUPE, L.L.C.

ATTORNEYS AND COUNSELORS AT LAW

2223 Quail Run Drive, Suite G, Baton Rouge, Louisiana 70808

Tel (225) 767-2222 • Fax (225) 767-9003

July 24, 2002

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

NO.: 7002 0460 0001 9147 0243

Novartis Consumer Health, Inc.

By and Through its Registered Agent for Service of Process

Corporation Service Company

2711 Centerville Road, Suite 400

Wilmington, DE 19808

***RE: Daphine B. Donnelly, and Jerome Donnelly, Husband vs. Bayer Corporation, et al
34th JDC, St. Bernard Parish, Docket No.96,487, Division "C"***

Sir/Madam:

We represent Daphine B. Donnelly, and Jerome Donnelly, husband, in claims arising out of incidents, wherein our clients ingested a product containing PPA.

We have filed the above numbered and captioned suit on behalf of Daphine B. Donnelly, and Jerome Donnelly, husband, for damages resulting from this incident. Since you are a non-resident of Louisiana, we are obtaining service of process on you pursuant to LSA R.S. 13.3201 et seq. In order to comply with the requirements of law, we give you herewith notice of such service, together with a certified copy of the Petition and Citation which is being sent by the plaintiffs, via certified mail.

Please forward this matter to your attorney for immediate handling.

Sincerely,

CLAITOR, LOUPE & BATEMAN, L.L.C


J. Chandler Loupe

JCL:seb

Attachments

THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

CITATION

NO. 96-487

DAPHINE B. DONNELLY, AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION; NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.,
4LIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE;
SMOOTHIE KING CO, SMOOTHIE KING SYSTEMS, INC;
WALGREEN LOUISIANA CO, INC (D/B/A "WALGREENS")

TO NOVARTIS CONSUMER HEALTH, INC.
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
CORPORATION SERVICE COMPANY
2711 CENTERVILLE ROAD, SUITE 400
WILMINGTON, DE 19808

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for Damages. The Petition tells you what you are being sued for.

You must either DO WHAT THE PETITION ASKS, OR WITHIN THIRTY (30) DAYS after you have received these documents, you must file an answer or other legal pleadings in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W. St. Bernard Hwy, Chalmette, LA 70043.

If you do not do what the Petition asks, or if you do not file an answer or legal pleading within THIRTY (30) DAYS, a judgment may be entered against you without further notice.

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the 2nd day of July, 2002

sar P1

LENA R. TORRES
CLERK OF COURT

BY Susan A. Randazzo
Deputy Clerk/S/ SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ this Parish in the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with this service I learned by interrogating the same _____ the said _____ being absent from _____ domicile at the time of said service

Returned Parish of St. Bernard _____, 2002

Sheriff

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ on _____ at _____ this Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to in _____
Returned Parish of St. Bernard _____, 2002

Sheriff

THIRTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

CITATION

NO 96-487

DAPHNE B. DONNELLY, AND JEROME DONNELLY, HUSBAND

VERSUS

BAYER CORPORATION, NOVARTIS PHARMACEUTICALS
CORPORATION; NOVARTIS CONSUMER HEALTH, INC.,
LIFE RESEARCH, LC, SUCCESSOR BY MERGER TO SHAPERITE,
SMOOTHIE KING CO., SMOOTHIE KING SYSTEMS, INC.;
WALGREEN LOUISIANA CO. INC (D/B/A "WALGREENS")

TO NOVARTIS PHARMACEUTICAL CORPORATION
BY AND THRU ITS REGISTERED AGENT FOR SERVICE OF PROCESS
320 SOMERULOS STREET
BATON ROUGE, LOUISIANA

YOU HAVE BEEN SUED. Attached to this Citation is a certified copy of Petition for
Damages. The Petition tells you what you are being sued for

You must either DO WHAT THE PETITION ASKS, OR WITHIN FIFTEEN (15)
DAYS after you have received these documents, you must file an answer or other legal pleadings
in the office of the Clerk of Court at the St. Bernard Parish Courthouse, 1100 W. St. Bernard
Hwy, Chalmette LA 70043

If you do not do what the Petition asks, or if you do not file an answer or legal pleading
within FIFTEEN (15) DAYS, a judgment may be entered against you without further notice

This Citation was issued by the Clerk of Court for St. Bernard Parish, Louisiana on the
2nd day of July, 2002.

sar PI

LENA R. TORRES
CLERK OF COURT

BY Susan A. Randazzo
Deputy Clerk/ST SUSAN A. RANDAZZO

DOMICILIARY

Received Parish of St. Bernard on the _____ day of _____, 2002 and on the _____ day of _____, 2002, I served a copy of the within _____ by leaving the same at _____ domicile _____ this Parish in the hands of _____ a person apparently over the age of 14 years living and residing in said domicile, whose name and other facts, connected with the service I learned by investigating the same _____ at the time of said service.

PERSONAL

Received Parish of St. Bernard on the _____ day of _____, 2002, I served a copy of the within _____ on _____ this Parish his usual place of domicile, in the Parish of St. Bernard, by handing and delivering the same to an _____ Returned Parish of St. Bernard _____, 2002

Sheriff

AFFIDAVIT OF STEVE KUHNAU

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state set forth above, personally came and appeared

STEVE KUHNAU

who, after being duly sworn, deposed and stated the following.

1

I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, could and would competently testify to the following.

2

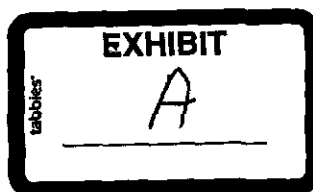
The Smoothie King store located at 3366 Paris Road, Chalmette, Louisiana is the only store operated in Chalmette, Louisiana and there has been no other store operating in that geographic location in the history of the Smoothie King franchising business.

3

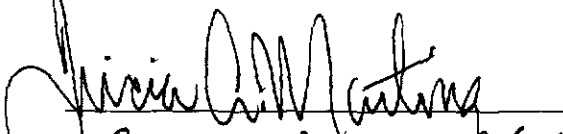
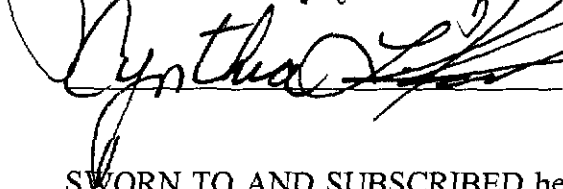
The Franchise Agreement #20 which authorizes this Chalmette, Louisiana location was executed by franchisees on October 9, 1991

4

This Smoothie King store opened on February 17, 1992 at the location of 3366 Paris Road, Chalmette, Louisiana



WITNESSES.


STEVE KUHAU
Chairman, Board of Directors

SWORN TO AND SUBSCRIBED before me, this 26 day of July, 2002, in New Orleans,
Louisiana


Notary Public



9850 South 300 West • Sandy UT 84070 • (801) 562-3600 • (801) 562-3611 Fax

July 31, 2002

VIA FACSIMILE ONLY
(504) 585-7075

Charles Blanchard
CHAFFE, MCCALL, PHILLIPS, TOLER & SARPY
2300 Energy Centre, 1100 Poydras St
New Orleans, LA 70163

Re Donnelly, et al v Bayer Corporation, et al
34th JDC, St Bernard Parish
Docket No 96,487, Division "C"
Consent to Notice of Removal

Dear Charles

I am corporate counsel for 4Life Research, LC, one of the named defendants in the above action. I am responsible for managing all litigation for 4Life worldwide.

4Life is incorporated in Utah, and has its principal place of business in Sandy, Utah.

You have indicated that Bayer and other defendants plan to file a Notice of Removal in the U.S. District Court for the Eastern District of Louisiana, and that all defendants who have been properly served in the action must agree to such removal. 4Life was served with the complaint in the above action on **July 29, 2002**, and hereby consents to the notice of removal, but reserves all defenses, objections, and claims.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J.B. Brannelly", written over a horizontal line.

Jack Brannelly
Vice President of Legal Affairs
4Life Research, LC

JJB/

cc Steve Tew, CFO, COO
File



United States District Court
Eastern District of Louisiana

Donnelly

v.

CIVIL ACTION NO. 2:02-cv-02436 "N"

Bayer Corporation

The record reflects that a Notice of Removal has been filed in the captioned case; accordingly,

Pursuant to 28 U.S.C. 1447(b), the removing party is directed to file within 10 days:

- (1) A list of all parties still remaining in this action;
- (2) Copies of all pleadings, including answers, filed by those parties in state court; and
- (3) Copies of the return on service of process on those parties filed in state court.

New Orleans, Louisiana, August 8, 2002.

By Direction of the Court

LORETTA G. WHYTE, CLERK



CASE: 2:02-cv-02436
DOCUMENT: 1
DATE 08/08/02
CLERK tbl

Notices sent to:

Mary Meyer by fax to 504-544-6077
Joy Braun by fax to 504-582-1555

Document scanned by: JA [signature]